Sexual Reorientation

Elizabeth M Glazer
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Bisexuals have been invisible for at least ten years. Ten years ago, Kenji Yoshino wrote about the “epistemic contract of bisexual erasure,” the tacit agreement between both homosexuals and heterosexuals to erase bisexuals. Though legal scholarship has addressed bisexuality only in rare moments, Yoshino’s epistemic contract of erasure answered Ruth Colker’s earlier call for a “bi jurisprudence” and explained why the “vast and vastly unacknowledged wall between heterosexual and homosexual identities” that Naomi Mezey identified has been so “vigilantly maintained.” While the tenth anniversary of the publication of Yoshino’s article is reason enough to revisit the topic of bisexual erasure, this Article revisits the topic in light of the recent storm of same-sex marriage litigation.

Lately, it seems more homosexuals than heterosexuals are erasing bisexuals, and more overtly than at the time Yoshino identified the phenomenon of bisexual erasure. Because the fight for same-sex marriage recognition is a fight to fit into the guarded category of marriage, members of same-sex relationships and their advocates have an interest in fitting into a stable sexual orientation category, which bisexuality is not. This Article, at the very least, hopes to make the bisexual slightly less invisible from legal scholarship at a time when the threat of bisexuality, and the erasure of bisexuals, seem to have intensified. More ambitiously, this Article introduces terminology that serves as a first step toward making bisexuals—along with other individuals along the continuum of sexual orientation who are even more invisible than bisexuals—visible.

This new terminology distinguishes between an individual’s “general orientation” and an individual’s “specific orientation.” An individual’s general orientation is the sex toward which the individual is attracted as a general matter. An individual’s specific orientation is the sex of the individual’s chosen partner. In many cases the two orientations are identical, but for bisexuals who partner with only one person the two orientations necessarily differ. While introducing new words will not solve the problem of bisexual invisibility, it might allow those who have struggled with asserting their bisexual orientations—those who were in a relationship with a member of the opposite sex and later wished to partner with a member of the same sex (or vice-versa)—to do so without having to recant their previous relationships. This terminology describes an individual’s sexual orientation with reference to her status as well as her conduct. It
also describes her sexual orientation individually as well as relationally. Moreover, in addition to ameliorating the problem of bisexual invisibility, distinguishing between individuals’ specific and general orientations will help to debunk commonly believed myths about bisexuals, bridge the gap between diametrically opposed sides of the stalemated same-sex marriage debate, and clarify the purpose of the LGBT rights movement by broadening the concept of sexual orientation.
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INTRODUCTION

Bisexuals have been invisible for at least ten years. Ten years ago,
Kenji Yoshino wrote about the “epistemic contract of bisexual erasure,” the tacit agreement between both homosexuals and heterosexuals (collectively, “monosexuals”) to erase bisexuals.\(^1\) Though legal scholarship has addressed bisexuality only in rare moments,\(^2\) Yoshino’s epistemic contract of erasure answered Ruth Colker’s earlier call for a “bi jurisprudence”\(^3\) and explained why the “vast and vastly unacknowledged wall between heterosexual and homosexual identities” that Naomi Mezey identified has been so “vigilantly maintained.”\(^4\) This Article, at the very least, hopes to make the bisexual slightly less invisible from legal scholarship at a time when the threat of bisexuality, and the erasure of bisexuals, seem to have intensified. More ambitiously, this Article introduces terminology that serves as a first step toward making bisexuals—along with other individuals along the continuum of sexual orientation who are even more invisible than bisexuals—visible.

While the tenth anniversary of the publication of Yoshino’s article is reason enough to revisit the topic of bisexual erasure, this Article revisits the topic in light of the recent storm of same-sex marriage litigation and legislation. Lately, it seems more homosexuals than heterosexuals are erasing bisexuals, and more overtly than at the time Yoshino identified the phenomenon of bisexual erasure.\(^5\) Because the fight for same-sex marriage

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\(^2\) There has been a recent flurry of interest among legal scholars in the topic of bisexuality. An article analyzing bisexual invisibility in the law will be published later this year. See Heron Greenesmith, Drawing Bisexuality Back into the Picture: How Bisexuality Fits into LGBT Legal Strategy 10 Years after Bisexual Erasure” CARDOZO J. L. & GENDER (forthcoming 2010), available at http://works.bepress.com/heron_greenesmith/3/. In addition, both law fellows at the Charles R. Williams Project on Sexual Orientation Law, the leading think tank dedicated to the field of sexual orientation law and public policy, at UCLA Law School, are currently working on projects that relate to bisexuality. See Works-in-Progress Series, Alexandra Lang Susman, Litigating Fluidity?: Legal Recognition and Protection of Bisexual Identity, available at http://www.law.ucla.edu/williamsinstitute/programs/WorksInProgressSpeakersSeries2009-2010.html; Faculty Biography, Michael Boucai, available at http://www.law.ucla.edu/home/index.asp?page=3452 ("His current projects deal with bisexuality’s obscured centrality to debates about gay rights . . . .").

\(^3\) See RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW, 15-38 (1996) (introducing a perspective that rejects conventional bipolar categories in the areas of gender, race, and disability).

\(^4\) Naomi Mezey, Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts, 10 BERKELEY WOMEN’S L.J. 98, 100 (1995).

\(^5\) See Yoshino, supra note 1, at 395 (commenting that while “[a] few decades [before], explicit denial appear[ed] to have been fairly common even among academic theorists, some of whom believed that all self-identified bisexuals were actually homosexuals in denial[,] . . . . perhaps the more prominent form of denial [at the time he wrote was] the implicit one.”).
recognition is a fight to fit into the guarded category of marriage, members of same-sex relationships and their advocates have an interest in fitting into a stable sexual orientation category, which bisexuality is not. For example, the National Center for Lesbian Rights (NCLR) recently filed suit against the North American Gay Amateur Athletic Association (NAGAAA) which disqualified the San Francisco Gay Softball League’s D2 team because it counted among its members three bisexuals, thereby violating (according to the NAGAAA) the rule that no team participating in the World Series can have more than two heterosexuals. A press release for NCLR stated that, “In response to a player’s statement that he was attracted to both men and women, a NAGAAA member responded, ‘This is the Gay World Series, not the Bisexual World Series.’”

Consider, too, the portion of the transcript of Perry v. Schwarzenegger, the controversial federal same-sex marriage trial challenging the constitutionality of California’s Proposition 8, where attorney Ted Olson asked Sandy Stier, one of the plaintiffs in the case, on direct examination, “How convinced are you that you’re gay? You’ve lived with a husband. You said you loved him. Some people might say, ‘Well, it’s this and then

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7 Id.

Not everyone in the gay rights movement, however, was thrilled by the sudden intervention of the two limelight-grabbing but otherwise untested players in the bruising battle over Proposition 8 [David Boies and Theodore Olson]. Some expressed confusion at the men’s motives and outright annoyance at the possibility that a loss before the Supreme Court could spoil the chances of future lawsuits on behalf of same-sex marriage. “It’s not something that didn’t occur to us,” Matt Coles, the director of the LGBT project at the American Civil Liberties Union, said of filing a federal lawsuit. “Federal court? Wow. Never thought of that.”

10 Proposition 8, also known as the California Marriage Protection Act, amended the California Constitution so that Section 7.5 of the same provided that “[o]nly marriage between a man and a woman is valid or recognized in California.” See Letters from Dennis Hollingsworth, Gail J. Knight, Martín F. Gutierrez, Hak-Shing William Tam, and Mark A. Janssen to Initiative Coordinator, Office of the California Attorney General (Oct. 1, 2007), available at http://www.ag.ca.gov/cms_pdfs/initiatives/i737_07-0068_Initiative.pdf.
it’s that and it could be this again.’ Answer that.”

Olson’s question was not unreasonable because the lawsuit alleged, *inter alia*, that Proposition 8 discriminated on the basis of sexual orientation. But his question erased the possibility that Stier identified as a bisexual. Olson made reference in his question to a myth about bisexuals, which “some people might” believe, namely that bisexuals are promiscuous, indecisive, and that they occupy a transitional sexual orientation that will necessarily change at some point. Stier responded to Olson as follows: “Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris.”

Stier may have been convinced. She may have even become convinced because she fell in love one time with another woman. But imagine that Stier, prior to meeting Kris Perry, had been attracted to people with blue eyes only. Assume, for argument’s sake, that Kris Perry had green eyes. On the basis of this deviation from her general “type,” Stier would probably not encounter an interlocutor asking how convinced she was that she was now attracted to people with green eyes. If ever confronted with a question about Kris’s eye color, Stier could just explain that while she was generally attracted to those with blue eyes, she happened to fall in love with someone whose eyes were green.

One might argue that eye color is different from sex, because sex, as opposed to eye color, is the definitive characteristic upon which people discriminate erotically. But this argument begs the question. By assuming that sex is the definitive characteristic upon which people discriminate erotically, one concludes that sex is the definitive characteristic upon which people discriminate erotically. Eve Kosofsky Sedgwick noted that there were other axes along which to differentiate between people with regard to their sexual preferences. Moreover, the existence of even one bisexual person undermines the assumption that sex is any more definitive than eye color for the purpose of erotic discrimination. Thus the problem remains. Why should Steir have been convinced of her general preference for one sex over another on the basis of a single specific relationship?

It is of course possible that Stier is now exclusively attracted to women.

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14 *See EVE KOSOFSKY SEDGWICK, EPSTEMOLOGY OF THE CLOSET 25-26 (1990).*
15 Stier may not be a logician, nor do matters relating to sexual preference need to make logical sense, but it is worth noting that her conclusion defies the rules of formal logic. She concluded on the basis of a specific relationship that her general orientation in relationships had changed. *See Inductive Reasoning, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/logic-inductive/#1.*
It is possible that she does not identify as bisexual. As conceded earlier, it is even possible that Stier became convinced of her homosexual orientation on the basis of falling in love with Kris Perry. By using Stier’s testimony as a point of entry to discuss the nature of bisexual orientation, this Article does not mean to suggest that Stier lied about her sexual orientation (to others or to herself). Instead, the purpose is to ask whether, in the event that Stier did not identify as homosexual, she would have had any words to express her unwavering commitment to Kris Perry. The answer, it seems, is no.

Though he offered substantive reasons for the erasure of the bisexual, Yoshino elaborated on the problem as one of words. He explained that at the outset of his seminar on Sexual Orientation and the Law, he led his students in a discussion about, among other things, why conversations about sexual orientation tend to focus exclusively on heterosexuality and homosexuality, to the exclusion of bisexuality. He even argued that “sexual orientation classifications that only used the two ‘monosexual’ terms ‘heterosexual’ and ‘homosexual’ were unstable and naïve.” Yet as soon as the class moved on from this introductory discussion, the whole class—including Yoshino himself—continued speaking in terms of a heterosexual/homosexual binary. He said he “found [him]self and the class falling back into the very ‘unstable’ usages [he] had worked hard to retire—specifically the usages of the words ‘heterosexual’ and ‘homosexual’ as mutually exclusive, cumulatively exhaustive terms.” He explained further that efforts to “us[e] the word ‘queer’ instead of ‘gay,’ or [to] add[,] the rider ‘or bisexual’ to ‘gay’ . . . were token and fitful.”

Perhaps because of this word problem, “[m]any who would not deny that bisexuals exist when the subject of bisexuality arises can nonetheless revert to the straight/gay dichotomy when the topic shifts.” Carlos Ball has said that, “[i]n many ways, overcoming invisibility is the first step in successfully demanding basic civil rights.” And as I have argued before, the act of naming is an important step toward making visible those distinctions that even those who perceive them cannot express adequately before those distinctions are named. For this reason those who understand

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16 See discussion infra Part I.A.
17 Yoshino, supra note 1, at 357-58.
18 Id.
19 Id.
20 Id.
22 See Elizabeth M. Glazer, When Obscenity Discriminates, 102 NW. U. L. REV. 1279 (2008) (arguing that the obscenity doctrine should make explicit the distinction between sex and sexual orientation) [hereinafter, Glazer, When Obscenity Discriminates]; Elizabeth
that bisexuals exist—and even Kenji Yoshino—“can speak at length about bisexuals at one moment and then, in the next, field a question such as ‘Is X straight or gay?’ without instinctively feeling as if an important possibility—the bisexual possibility—has been elided.”

Words to name those aspects of bisexuality that have made the orientation invisible are needed. This Article offers words. Words that could have helped Kenji Yoshino talk to his students about sexual orientation without having to resort to the very binary he rejected. Words that might help NCLR and the NAGAAA to understand that the presence of bisexuals does not threaten the integrity of a gay softball league, and to draft a policy that reflects that understanding. Words that could have helped Sandy Stier express the intensity of her feelings for Kris Perry without minimizing the importance of her first marriage.

The words that this Article offers separate into subcategories individuals’ sexual orientations. This Article introduces and urges a distinction between an individual’s “general orientation” and an individual’s “specific orientation.” An individual’s general orientation is the sex toward which the individual is attracted as a general matter. An individual’s specific orientation is the sex of the individual’s chosen partner. In many cases the two orientations are identical, but for bisexuals who partner with only one person the two orientations necessarily differ.

While introducing new words will not solve the problem of bisexual invisibility, it might allow those who have struggled with asserting their bisexual orientations—those who were in a relationship with a member of the opposite sex and later wished to partner with a member of the same sex (or vice-versa)—to do so without having to recant their previous relationships.

M. Glazer, Seeing It, Knowing It, 104 NW. U. L. REV. COLLOQUIY 217 (2009) (defending the need for the obscenity doctrine to make this distinction explicitly before the Supreme Court confronts a conflict between Lawrence v. Texas, 539 U.S. 558 (2003) and Miller v. California, 413 U.S. 15 (1973)) [hereinafter Glazer, Seeing It, Knowing It]; Elizabeth M. Glazer, Name-Calling, 37 HOFSTRA L. REV. 1 (2008) (criticizing the practice of using gendered titles (e.g., Mr., Ms.) in the law school classroom to refer to students who have not identified that they wish to be distinguished on the basis of their gender) [hereinafter Glazer, Name-Calling]; Elizabeth M. Glazer, Naming’s Necessity, 19 TUL. J.L. & SEXUALITY 166 (2010) (urging scholars who write about the law as it relates to sexual orientation and gender identity to consider the words they use to refer to their constituent group).

Yoshino, supra note 1, at 358-59.

The possibility remains, of course, that a bisexual’s general and specific orientations need not differ provided that the bisexual is attracted to a single intersexed person. This possibility is discussed further in Yoshino’s article. See Yoshino, supra note 1, at 360. For further elaboration on the intersexed community, see Julie A. Greenberg, When Is a Man a Man and When Is a Woman a Woman?, 52 FLA. L. REV. 745 (2000).
At a time when bisexuals seem to be proliferating, this is a particularly important move. A 2001 study profiled successful marriages between bisexual men and their wives, and a 2002 study highlighted successful heterosexual marriages between men and bisexual women. A 2006 New York Magazine article spent a day at Stuyvesant High School with the “cuddle puddle,” a clique of high school juniors whose members admit sexual attraction to, and sexual experiences with, members of both sexes. According to the updated 2009 edition of The Ethical Slut, the “practical guide to polyamory,” “bisexuals have recently begun developing their own forceful voice and their own communities.” Bisexuality has also come up increasingly in the Hollywood community and in the context of popular culture.


29 In this Article I will not question the norm of monogamy, as others have. See, e.g., Elizabeth F. Emens, Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. L. Rev. Soc. Change 277 (2004); Susan Frelich Appleton, Parents by the Numbers, 37 Hofstra L. Rev. 11 (2009); Adrienne D. Davis, The Game of Love: Polygamy, Default Rules, and Bargaining for Equality, COLUM. L. Rev. (forthcoming 2010) (draft on file with author). I take monogamy as a given in this Article for two reasons. First, I wish to focus my attention here to the problem of bisexual invisibility, which can be explained in part by a devotion to the norm of monogamy, but not entirely. Second, in a forthcoming essay I will apply the framework presented in this Article to polygamous relationships. See Elizabeth M. Glazer, Polygamy and Perfect Bisexuality, COLUM. L. Rev. Sidebar (forthcoming 2010).

30 EASTON & HARDY, supra note 28, at 33.

Now is also a particularly important time to combat bisexual erasure because the LGBT rights movement is in a regrettably fractured state. In order to secure victories in its two biggest battles—for same-sex marriage recognition and for the prohibition of discrimination in the workplace—LGBT rights advocates have “intentionally l[e]ft parts of the community behind,” namely the transgender and bisexual parts. For example, the


As is the unspoken custom when writing legal scholarship about sexual orientation, I provide a note on the terminology I will use in this Article. The initialism “LGBT” stands for lesbian, gay, bisexual, and transgender. While there are other terms available to refer to sexual minorities, I use “LGBT” because it is the most politically salient right now. Moreover, because I will make reference in this Article to the differing interests held by the individuals whose initials comprise this group (e.g., lesbians and gays versus bisexuals; lesbians and gays versus transgender people; bisexuals versus transgender people), referring to the movement for LGBT rights is useful. For a brief analysis of changes in naming this political movement, see Elizabeth M. Glazer, Naming’s Necessity, 19 TUL. J.L. & SEXUALITY 166 (2010).


exclusion of transgender$^{35}$ individuals from an earlier draft of the Employment Nondiscrimination Act (ENDA)$^{36}$ caused sharp division among LGBT rights advocates. Public support for a trans-inclusive ENDA ultimately brought about support among all LGBT rights advocates for a version of ENDA that prohibited discrimination on the basis of sexual orientation and gender identity.$^{37}$ The interests of transgender people have not yet been fully integrated into the LGBT rights movement’s goals, but litigation,$^{38}$ scholarly attention,$^{39}$ and the political attention that the ENDA debate attracted have heightened the collective sensitivity to the harms that transgender people face. Bisexuals, on the other hand, have remained a minority among minorities. Their existence, let alone the harms that they face, has been erased by those with whom they supposedly share a movement.

At this point one might reasonably ask what, if any, harms bisexuals face on the basis of their bisexuality. For example, unlike homosexuals, bisexuals have the right to marry in every state. After all, if the definition

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$^{35}$ As I have in other work, I employ throughout this Article the following broad and inclusive definition of the term “transgender,” which I borrow from Anna Kirkland: “gender variant people who have not necessarily sought to change their bodies but nonetheless feel a disjunction between their biologically and sociologically gendered selves,” which is considered broader than, and to include within its definition, the term “transsexual,” which “refers to people who identify as [transsexual] and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status.” See Elizabeth M. Glazer & Zachary A. Kramer, Transitional Discrimination, 10 TEMP. POL. & CIV. RTS. L. REV. 651, 652 n.8 (2009) (quoting Anna Kirkland, Victorious Transsexuals in the Courtroom: A Challenge for Feminist Theory, 28 LAW & SOC. INQUIRY 1, 2 (2003)).

$^{36}$ H.R. 3017 § 2(2); S. 1584, 111th Cong. (2009).

$^{37}$ See discussion infra Part III.B.

$^{38}$ See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (concluding, in a case involving transgender plaintiff Karen Ulane, that Title VII’s prohibition against “sex” discrimination did not cover discrimination based on gender identity); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (holding that transgender plaintiff Jimmie Smith could state an actionable claim for discrimination under Title VII); Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005) (affirming Smith on the same grounds for discrimination against transgender plaintiff Phelicia Barnes); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (holding that Diane Schroer experienced discrimination in violation of Title VII when her employer rescinded her job offer after Schroer told her employer she was transitioning from male to female).

of a bisexual is someone who could be attracted to either someone of the same or opposite sex, a bisexual person who chooses to marry a member of the opposite sex has the same rights to marry as any heterosexual person. And an employer who discriminates against an employee on the basis of sexual orientation is likely to harbor an equal distaste for homosexuals and bisexuals; moreover, an employee fired or not hired on the basis of his bisexuality is just as protected as anyone fired or not hired on the basis of another sexual orientation.

Promoting bisexual visibility is important in spite of these valid points for two principal reasons. First, there are some cases in which the law has encountered bisexuals and has ruled against them. In these cases, courts have not articulated whether a plaintiff’s bisexuality mattered to them, or if so to what extent or in what way. It is possible, for example, that courts appealed to widely held myths about the hypersexual and promiscuous nature of bisexuals when deciding cases in which bisexuals have lost custody to their children or have been dismissed from school environments. It is impossible, however, to know.

The second reason for promoting bisexual visibility does not really have to do with bisexuals, but is perhaps even more important than the first reason. Like other literature about bisexual invisibility, this Article focuses on bisexuality as a “useful . . . theoretical tool” with which to “critique . . . the homo/hetero paradigm.” By understanding the experiences of those who do not fit into that paradigm, we can better understand “how determined [society] is to retain a polarized classification scheme.” Thus this Article examines bisexuality not in order to create yet another category of sexual orientation but instead in order to understand “why we have divided the world of orientation into categories that tend to suppress the existence of bisexual desire.” Moreover, this Article does more than examine bisexual invisibility, which existing commentary has already skillfully done. This Article offers a way to increase bisexual visibility. As a result of the unique theoretical power of bisexuality, increasing bisexual visibility generates gains not only for bisexuals but for everyone who has a sexual orientation. Distinguishing between general and specific orientations

40 As might be expected, there are a number of different definitions of bisexuality that one could employ. See Yoshino, supra note 1, at 370-77.
41 See discussion infra Part I.A.
42 See discussion infra Part III.B.
43 See infra notes 66-70 and accompanying text.
44 See infra notes 74-78 and accompanying text.
45 Mezey, supra note 4, at 99.
46 Ruth Colker, Bi: Race, Sexual Orientation, Gender, and Disability, 56 OHIO ST. L.J. 1, 2-3 (1995).
47 Yoshino, supra note 1, at 359.
generates a broad sexual reorientation.\textsuperscript{48}

Our current vocabulary cannot save even the most well-intentioned individual from the trap of the heterosexual/homosexual binary.\textsuperscript{49} Thus, in proposing an alternative to that binary, one must be sensitive to this challenge. The distinction presented in this Article can overcome that challenge for two principal reasons. First, this Article urges the usage of new and different words. Words are extremely important—particularly so that the law can incorporate a correct understanding of, for example, sexual orientation—but they are still just words. Second, the words that this Article introduces fit into the sort of rigid binary, categorical structure that this Article argues against. While one might argue that this aspect of the Article’s proposal is hypocritical, one might alternatively argue that this characteristic increases the proposal’s likelihood of adoption into the general vocabulary and collective consciousness.

Moreover, the distinction answers the call in legal scholarship about sexual orientation law to characterize sexual orientation by reference not

\textsuperscript{48} I must qualify that by “sexual reorientation” I do not mean the controversial practice by some psychotherapists of converting gays and lesbians into heterosexuals. But this homonymic accident presents the opportunity to note that this kind of therapy is exactly the sort of thing that would not exist in a world that adopted the sexual orientation framework offered in this Article. This Article’s framework aims to reflect the dynamic nature of sexual orientation, instead of the static nature of sexual orientation that currently pervades the collective conscience and that operates particularly strongly for those who believe that a reformative process can, from one moment in time, change one’s sexual orientation. For a discussion of the debate about sexual reorientation therapy, see David B. Cruz, \textit{Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law}, 72 S. Cal. L. Rev. 1297 (1999). The practice of sexual reorientation therapy is embraced by certain groups, many of which are religiously affiliated. \textit{See, e.g.}, Philip M. Sutton, Ph.D., “Do You Do Reparative Therapy?” \textit{The Making of a NARTH Psychologist}, \textit{National Association for Research & Therapy of Homosexuality}, 2004, http://www.narth.com/docs/coll-sutton.html; Reparative and Other Therapies for Homosexuals, http://www.religioustolerance.org/hom_repar.htm (last visited Sept. 7, 2010); Jews Offering New Alternatives to Homosexuality, JONAH’s Suggested Questions for a Therapist or Counselor, http://www.jonahweb.org/sections.php?secId=118&hilit=therapist (last visited Sept. 7, 2010). The American Psychological Association does not endorse sexual reorientation therapy, however. \textit{See American Psychological Association, Answers to Your Questions: For a Better Understanding of Sexual Orientation and Homosexuality} (2008), available at http://www.apa.org/topics/sexuality/sorientation.pdf (“All major national mental health organizations have officially expressed concerns about therapies promoted to modify sexual orientation. To date, there has been no scientifically adequate research to show that therapy aimed at changing sexual orientation . . . is safe or effective. Furthermore, it seems likely that the promotion of change therapies reinforces stereotypes and contributes to a negative climate for lesbian, gay, and bisexual persons.”).

\textsuperscript{49} \textit{See supra} notes 16-23 and accompanying text.

\textsuperscript{50} \textit{See supra} notes 21-22 and \textit{infra} notes 200-222 and accompanying text.
only to status but also conduct.\textsuperscript{51} A general orientation makes reference to an individual’s sexual orientation status, whereas a specific orientation describes the way the individual behaves with respect to a particular and current partner. The distinction also bridges a related debate in this area of scholarship about whether to conceive of sexual orientation individually or, instead, relationally.\textsuperscript{52} Under the new terminology, individuals are identified by reference to their relationships only when they reveal their specific orientations but can maintain their individual sexual orientation identities through their general orientations.

Lastly, in addition to ameliorating the problem of bisexual invisibility and responding to debates within legal literature, the proposal presented in this Article offers three advantages that relate to issues of concern for LGBT rights. First, because the bisexual is a symbol of the fluidity that accurately reflects the human experience of sexual orientation, promoting bisexual visibility will help to broaden and clarify the purpose of the LGBT rights movement—instead of protecting individuals who fit into the rigid sexual orientation binary, the movement can protect all individuals who experience discrimination because of their sexual preferences. Second, by helping individuals to recognize bisexuality and the characteristics that the range of bisexuals embody, increasing bisexual visibility will help to debunk commonly believed myths about bisexuals. Third, because both sides of the stalemated same-sex marriage agree that a married person’s attraction to anyone other than his spouse should be irrelevant to the institution of marriage—which, of course, means the union of two people for life—individuals’ general sexual orientations should not matter at all when debating the issue of whether the law should recognize marriages between same-sex couples. Marriage should then be a right that individuals have to marry their chosen partners, toward whom they have a specific orientation. Thus, at least in theory, diametrically opposed sides of the same-sex marriage debate could agree that marriage is neutral to individuals’ general sexual orientations.

\textsuperscript{51} See, e.g., Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights (2006); Mezey, supra note 4, at 99 (arguing “that a new conceptualization of sexual identities, such as one based on acts, is needed”); Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1 (1995); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001); Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 Tex. L. Rev. 167 (2004).

This Article proceeds in three parts. Part I revisits the topic of bisexual erasure in light of new developments in the patterns of bisexual erasure and the proliferation of bisexuals. After a brief story about my own experience relating to bisexuality, Part II responds to the problem of bisexual erasure by introducing and explaining the distinction between general and specific orientations, which Part II situates within relevant literature. Part III then describes the additional advantages of distinguishing between general and specific orientations before the Article briefly concludes.

I. BISEXUAL ERASURE, REDUX

This Article aims to remedy the problem of bisexual invisibility. Therefore, this Article presumes that bisexual invisibility is a problem. Not every reader will agree that bisexual invisibility is a problem, however. Some readers might argue that the law has encountered bisexuals and that they are therefore visible. Part I.A explains why those instances in which bisexuality might be a visible category in the law do not discredit the account of bisexual erasure upon which this Article is premised. Next, Parts I.B and I.C examine bisexual erasure—first the kind observed by earlier scholars and next the more recent examples of overt bisexual erasure by gays, lesbians, and their advocates. This erasure would be a problem even if the bisexual population had remained constant or showed no signs of growth, but as Part I.D demonstrates, there seem to be signs that the bisexual population has been growing and that it will continue to proliferate.

A. Possible Visibility

The theory that bisexuels are invisible is a powerful one in the context of scholarship about the law as it relates to sexual orientation. The law likes categories, boxes, bright lines, a clear distinction between what is black and what is white, and bisexuals offer none of those things, and arguably represent incarnate their antithetical fluidity. But the fact that it makes sense that the law would not be able to see bisexuality should not convince the reader that the law does not see it. The law has confronted bisexuals and bisexuality, and it is worthwhile before undertaking to remedy the problem of bisexual invisibility to scan those instances in which the law has mentioned it. In no instance in which the law has mentioned bisexuality is it possible to know whether, or in what way, bisexuality mattered to a court. Thus these instances do not undermine the claims of bisexual invisibility or the theory of bisexual erasure.

Some instances of bisexual visibility in the law have been hypothetical.
Take, for instance, the most famous mention of bisexuality in case law: the hypothetical example of the so-called bisexual harasser, where the judge dismissed allegations of sexual harassment because the alleged harasser, a male whose actions were directed toward females, was merely “satisfying a personal urge.” The judge then demonstrated why such desire-based harassment should not fit within the definition of sexual harassment under Title VII of the Civil Rights Act of 1964: “to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit.” The bisexual harasser appeared again in the 1977 case, Barnes v. Costle, this time by name, when the court noted that “[i]n the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.” In neither of these cases, however, was the bisexual harasser defense actually raised—these cases merely pointed out the possibility of a hypothetical bisexual harasser.

The bisexual harasser defense has been raised in only two cases, and has been accepted in neither case. Thus the “boilerplate phrase in sexual harassment law,” namely the Eleventh Circuit’s statement that “[e]xcept in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based on sex,” makes sense. Moreover, Yoshino has demonstrated that whether one adopts a “desire-based theory” that sexual harassment is actionable only if the harassment is

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53 This discussion tracks Yoshino’s discussion of the same. See Yoshino, supra note 1, at 434-58.
55 Id. at 163.
56 Title VII makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a) (1994). This statutory language has been interpreted to prohibit sexual harassment in the workplace. See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (where the Supreme Court established that hostile environment sexual harassment can constitute unlawful sex discrimination in violation of Title VII; for a novel reading of the Court’s decision in Meritor, see Zachary A. Kramer, Heterosexuality and Title VII, 103 N.W. U. L. REV. 205, 221-33 (2009)).
57 390 F. Supp. at 163.
58 561 F.2d 983 (D.C. Cir. 1977).
59 Id. at 990 n.55.
60 See Raney v. District of Columbia, 892 F. Supp. 283, 287-88 (D.D.C. 1995); Ryczek v. Guest Servs., Inc., 877 F. Supp. 754, 762 (D.D.C. 1995). For a more elaborate discussion of those cases that have, have not, and might have been expected to have raised the bisexual harasser defense, see Yoshino, supra note 1, at 443 n.486.
61 Yoshino, supra note 1, at 443.
62 Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
sexual in nature, or instead a “because of . . . sex” theory that sexual 
harassment is actionable because it would not have occurred but for the 
victim’s sex, the bisexual harasser exemption from sexual harassment 
liability has been, for all practical purposes, closed.

Yoshino has observed that “[s]exual harassment jurisprudence is 
distinctive in that it not only names bisexuality but treats it differently (and 
rhetorically more favorably) than either heterosexuality or 
homosexuality.” While that is true, bisexuality has also been mentioned 
in other contexts, like the child custody context. In In re Appeal in Pima 
County Juvenile Action B-10489, the Arizona Court of Appeals upheld the 
denial of an adoption petition brought by a bisexual man on the ground that 
“he testified that it was possible that he at some future time would have 
some type of homosexual relationship with another man.” The court 
clarified that “[t]he fact that the appellant is bisexual is not unlawful, not 
standing alone, does it render him unfit to be a parent. It is homosexual 
conduct which is proscribed.” Nonetheless, the appellant admitted to 
being bisexual and was unable to regain custody of his children. In D.L. v. 
R.B.L., a wife claimed that her husband should not be granted custody of 
the former couple’s children because he was a bisexual. On appeal, the 
court criticized the trial court’s “finding of fact regarding sexuality” because 
it was “based entirely on conjecture and speculation,” and such findings of 
fact could not be upheld on appeal. Nevertheless, the appeals court 
affirmed the trial court’s decision in awarding custody to the wife.

It is possible that the reasoning for the outcomes in both Pima and D.L. 
were no different from that in Lofton v. Secretary of the Department of 
Children and Family Services, where the Eleventh Circuit held that 
Florida’s provision that “[n]o person eligible to adopt under [Florida’s 
adoption] statute may adopt if that person is homosexual.” Even though

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63 See Yoshino, supra note 1, at 437 (citing Katherine M. Franke, What’s Wrong with 
Sexual Harassment?, 49 STAN. L. REV. 691, 692-93 (1997)).
64 See Yoshino, supra note 1, at 440 (“As a practical matter, the bisexual harassment 
exemption has been closed.”).
65 Id. at 439.
67 Id. at 835.
68 Id.
70 Id. at 419.
71 See id. at 420.
72 358 F.3d 804 (11th Cir. 2004). Florida’s ban on gay adoptions was recently 
overturned. See John Schwartz, Florida Court Calls Ban on Gay Adoptions Unlawful, 
73 Fla. Stat. Ch. 63.042(3).
bisexuality has been mentioned in the context of some litigation, it is impossible to know whether a litigant’s bisexuality operated differently from another litigant’s homosexuality.

Compare, for example, the outcomes in Rowland v. Mad River Local School District74 and Weaver v. Nebo School District.75 In Weaver, a district court in Utah held that letters sent from the school district to a lesbian volleyball coach warning the coach not to discuss her sexual orientation were held to violate the coach’s First Amendment rights because her sexual orientation became a matter of public concern when the school district brought it up. In Rowland, a school guidance counselor was suspended after she informed a secretary and the assistant principal at the school that she was bisexual. Relying on Pickering v. Board of Education,76 the district court found that the guidance counselor’s suspension violated the First Amendment. The Sixth Circuit relied on Connick v. Myers77 when reversing the district court, effectively holding that sexual orientation is not a matter of public concern that is protected by the First Amendment. It is impossible to know whether the outcome in Rowland differed from that in Weaver because the former case involved a bisexual and the latter a lesbian.78 There are confounding variables that differentiate the cases in other ways, including but not limited to the fact that in Weaver the school district brought up the issue of sexual orientation while in Rowland the guidance counselor did. Nevertheless, it should be noted that a bisexual orientation was held not to be a matter of public concern in Rowland while in Weaver a lesbian sexual orientation was.

Lastly, bisexuality may play a role in the immigration context, though it has not at this point generated an issue for litigation. The immigration context is really the only context in which legally recognized marriages are policed. Non-alien husbands and wives can fight all they want, never speak to each other, and sleep in separate bedrooms. In the immigration context, on the other hand, they cannot.79 Pursuant to 8 U.S.C. § 1325, an alien may

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74 730 F.2d 444 (6th Cir. 1984).
76 391 U.S. 563 (1968) (holding that teachers may not be fired because of speaking about issues of public concern).
78 In some contexts, like the military context, bisexuality has been visible but has not affected plaintiffs in a way that is different from homosexuality. See Schowengerdt v. U.S., 944 F.2d 483 (9th Cir. 1991) (upholding plaintiff’s discharge from the Navy on the basis of his bisexuality). For a deeper discussion of the military’s policy against homosexuality (and bisexuality), see Zachary A. Kramer, Heterosexuality and Military Service, 104 NW. U. L. REV. COLLOQUY 341 (2010).
79 See, e.g., Krazoun v. Ashcroft, 350 F.3d 208 (1st Cir. 2003). For a deeper discussion of the marriage fraud issue in the immigration context, see James A. Jones, The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?, 24
not marry a United States citizen for the sole purpose of gaining citizenship.\footnote{\textit{See} \textit{8 U.S.C. § 1325 (2010)}.} In fact, the statute provides that, “[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than five years, or find not more than $250,000, or both.”\footnote{\textit{8 U.S.C. § 1325 (c)}.} The hypothetical bisexual alien who married a member of the opposite sex, gained citizenship, subsequently divorced, and then coupled with a member of the same sex is rumored to have existed but has not appeared in court to litigate the issue of whether her marriage was, in fact, a sham, as the U.S. Citizenship and Immigration Services claimed it was. It is at this point merely a potential way that bisexuals might be harmed more than homosexuals, and differently from them. But as in each of these cases of possible bisexual visibility, while bisexuals are possibly visible in legal contexts, they are probably invisible. And more importantly, it is impossible to know for sure the extent, if any, that a litigant’s bisexuality played any role in the outcome of her case.

\section*{B. Sheep, Goats, and Bisexual Erasure}

Rarely but memorably has legal scholarship addressed bisexuality specifically.\footnote{\textit{See supra} notes 1-4 and accompanying text.} Moreover, when scholars—in law but also in other disciplines—have addressed bisexuality, they have focused on the extent to which bisexuals have been made invisible. In the legal literature, the work of three scholars—Colker, Mezey, and Yoshino—constitutes the conversation about bisexual invisibility.\footnote{\textit{Heron Greenesmith’s recent work is also notable. However, this section focuses on those scholars who have largely examined why bisexuals have been invisible, whereas Greenesmith’s work applies the theory of bisexual invisibility to specific examples in the law.} \textit{See} Greenesmith, \textit{supra} note 2.} Colker and Mezey, who wrote at roughly the same time, began the conversation about “bi categories,”\footnote{\textit{Colker, supra} note 46, at 1.} a category of categories that included bisexuality but which for Colker meant more generally the middle between extremes, where multiracial, bisexual, transgendered, and bi-abled\footnote{\textit{See \textit{id}. at 1-2. Colker coined and defined the term “bi-abled” to mean “individuals who are neither disabled nor able-bodied.” \textit{Id}. at 1 n.4.}} people resided. Mezey and Yoshino wrote about bisexuals only, in an effort to resist “the classification of persons...
according to a binary system of sexual orientation.”^{87} All three scholars can be understood to have urged a revival of Alfred Kinsey’s continuum, preferring that to a collection of sexual orientation categories. Mezey and Yoshino both quoted the classic statement in which Kinsey eschewed a categorical understanding of sexual orientation:

> Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separate pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.^{88}

In order to reach such a sound understanding, each of the three scholars offered a slightly different approach. The major difference between each of their approaches seems to be the extent to which each author embraced categories. Colker argued for the adoption of more and better categories by the law so that bisexuals could benefit from protections that were tied to membership in the monosexual categories of sexual orientation. Mezey and Yoshino, on the other hand, used bisexuality as a point of entry to critique the use of categorization to describe sexual orientation identity at all. For them, sexual orientation was fluid and would better be described by reference to a continuum than to a collection of categories. The sections that follow describe in further detail each of their approaches.

1. Better Categories: Colker’s Approach

Colker focused on the extent to which categories created “perpetuated bipolar injustice.”^{89} For Colker, categorization itself was not the enemy but instead the fact that categories were used inappropriately. An appropriate use for categories was, according to Colker, ameliorative. Colker argued for a “bi jurisprudence,” through which she advocated analyzing the experience of discrimination on the basis of hybrid traits (like bisexuality or

^{87} Yoshino, supra note 1, at 356 n.5.
^{88} ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 69 (1948). See Mezey, supra note 4, at 103-04; Yoshino, supra note 1, at 356 n.5.
^{89} COLKER, supra note 3, at 86.
multiracial identity) first, in order to understand better the way we subordinate individuals and second, in order to develop fair and effective ameliorative programs. Colker argued that grouping individuals into binaries but then forgetting to add a category for individuals who fall between those binaries has meant that we cannot ascertain the sorts of injustice that happen to those individuals.

In the sexual orientation context, Colker warned against proposals—like that of Arthur Murphy and John Ellington—to tie benefits to one’s identity as a “true homosexual.” This disadvantaged those who conducted themselves homosexually but may not have identified that way, like bisexuals. Colker argued for the importance of recognizing the harms that bisexuals suffered through a commitment to binary categories of sexual orientation, and for this reason proposed the recognition of the bi category of bisexuality.

2. A Focus on Conduct: Mezey’s Approach

Mezey strongly opposed categories, at least as they have been applied in the context of sexual orientation. She made a two-part argument. First, she argued for the decoupling of classifications of sexual orientation based on identity and those based on acts. She invoked the example of Bowers v. Hardwick to make this point. In Hardwick, the Supreme Court concluded that the privacy right implied in the Due Process Clause did not confer a fundamental right to engage in consensual homosexual sodomy when ruling on a facially neutral Georgia statute prohibiting sodomy. Despite the overruling of Hardwick by Lawrence v. Texas since Mezey wrote, her example is still instructive. She examined the Court’s decision in Hardwick, noting the Court’s conflation of sexual orientation identity and behavior. The Hardwick Court spoke of “the behavior that defines the class” despite the fact that the statute upon which its opinion was based was unconstitutional.

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90 Colker, supra note 85, at 2-4.
91 See Arthur A. Murphy & John P. Ellington, Homosexuality and the Law: Tolerance and Containment II, 97 Dick. L. Rev. 693, 709 (1993) (arguing that then existing sodomy laws should modified to illegalize sexual intercourse by mouth or anus with another person of the same sex, unless the accused could prove by a preponderance of the evidence that the individual’s sexual partner was ‘reasonably believed by the accused to be a true homosexual’).
92 See id. at 35-36.
93 See, e.g., Mezey, supra note 4, at 131 (“To the extent that sexual acts and sexual identity are rhetorically aligned, bisexuals and homosexuals will always struggle . . . .”).
95 539 U.S. 558 (2003) (holding that Texas’s same-sex sodomy statute was unconstitutional).
neutral as to the gender of participants. Because, as Mezey noted, heterosexuals perform acts of sodomy, the “[c]onduct, then,” of which the
Hardwick Court spoke, “only define[d] homosexual activity.”

Thus, the conflation of acts and identities functioned to hurt only those whose identities would ordinarily be associated with the acts proscribed in the
gender-neutral statute.

Mezey also argued for the elimination of sexual orientation classifications based on identity. This might seem like an argument that contradicts her first, but it is not. Mezey makes her first argument as a way to
demonstrate the negative consequences that have flowed from conflating sexual orientation identities and acts, in order to argue next that sexual orientation is really only about acts. Because there is no “act that defines a
class,” and instead only acts in which individuals engage no matter how they identify, Mezey argued that “sexual identity classification based on acts could mean a more genuine and liberating correspondence between identity and acts that would dissolve gender as the locus of sexual identity.”

She examined bisexuality in order to argue for such an alternative classification system because of bisexuality’s power to demonstrate the conflation of sexual orientation identities and acts. The moment a bisexual performs a sexual act, argued Mezey, the bisexual’s identity is subsumed into whatever identity that sexual act would indicate. For example, a bisexual who has sex with a member of the same sex is considered homosexual and a bisexual who has sex with a member of the opposite sex is considered homosexual. Because the bisexual’s acts do not track the way the bisexual identifies, classifying individuals’ sexual orientations by reference to how they identify is not useful. And because sexual acts derive classification based on the identity-based classification system for sexual orientation, Mezey argued ultimately that sexual orientation really cannot be ordered into classifications. After all, she argued, “the social and rhetorical categories of heterosexual and homosexual fail even remotely to approximate the actual range of human sexual activity, let alone human sexual desire.”

3. The Epistemology of Erasure: Yoshino’s Approach

Yoshino examined bisexuals with more of a descriptive lens than did either Colker or Mezey. He did not advocate any particular solution to the problem of bisexual erasure, instead offering what has served as the
definitive explanation of why bisexuals have been erased. His project was not exclusively descriptive, to be sure; he argued that bisexuals should be rendered more visible in the legal realm, particularly in the realm of sexual harassment law. The reason, for Yoshino, to promote bisexual visibility, was to represent accurately the fluid nature of human sexuality.

Yoshino argued that monosexuals were bound by an “epistemic contract of bisexual erasure,” which he defined as “a contract in the sense that a social contract is a contract,” meaning that it was “not a conscious arrangement between individuals, but rather a social norm that ar[ose] unconsciously.” And parties to this social or epistemic contract—heterosexuals and homosexuals—erased bisexuals by employing three strategies: class erasure, individual erasure, and deligitimation.

Class erasure was the denial of the entire category of bisexuality. Individual erasure permitted the recognition of the category of bisexuality, but referred to the contestation that any particular individual was a bisexual. And deligitimation referred to the acknowledgement of the existence of bisexuals, as a class and also of bisexual individuals, but the attachment to bisexuals of a stigma.

Yoshino argued that monosexuals shared an interest in erasing bisexuals for three reasons. First, both dominant sexual orientation groups had an interest in proving a monosexual identity:

[S]traights (for example) can only prove that they are straight by adducing evidence of cross-sex desire. . . . But this means that straights can never definitively prove that they are straight in a world in which bisexuals exist, as the individual who adduces cross-sex desire could be either straight or bisexual, and there is no definitive way to arbitrate between those possibilities.

The same was true for gays: they could only prove that they were gay by offering evidence of same-sex desire, which was called into question when bisexuals offered the same. The second interest that monosexuals shared was an interest in retaining the importance of sex as a distinguishing trait in society because “to be straight or gay is to discriminate erotically on the basis of sex.” And third, because “bisexuals [we]re often perceived to be

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99 Id. at 391-92.
100 These strategies are elaborated in Part I.B, infra.
101 See Yoshino, supra note 1, at 395.
102 See id. at 396.
103 Id. at 362.
104 Id.
‘intrinsically’ nonmonogamous,”\textsuperscript{105} heterosexuals and homosexuals erased bisexuals in order to defend the norm of monogamy. Each of Yoshino’s three interests was slightly different, but all of them demonstrated an anxiety that monosexuals had about preserving the stability of certain categories—monosexual identity, sex, and monogamy.

\section*{C. The New Bisexual Erasure}

Yoshino commented that while “[a] few decades [before], explicit denial appear[ed] to have been fairly common even among academic theorists, some of whom believed that all self-identified bisexuals were actually homosexuals in denial[,] . . . . perhaps the more prominent form of denial [at the time he wrote was] the implicit one.”\textsuperscript{106} As the fight for same-sex marriage has essentially become synonymous with the fight for LGBT rights,\textsuperscript{107} it may be unsurprising that efforts to erase bisexuals seem to have gotten stronger.\textsuperscript{108} The debate about legally recognizing same-sex marriages is, at its root, a debate about category-preservation.

Two principal shifts in bisexual erasure seem to have occurred since Yoshino identified the phenomenon. First, efforts to erase bisexuals seem to have become more overt than the efforts that Yoshino described. Second, while Yoshino wrote about the equal incentives for erasure for both heterosexuals and homosexuals, in the recent past it seems to be homosexuals rather than heterosexuals who are doing most of the erasing. These shifts are exemplified by two recent events, which are recounted in this section.

1. The Bisexual World Series

On April 20, 2010, the NCLR and the law firm of K&L Gates LLP filed a lawsuit in the United States District Court for the Western District of

\textsuperscript{105} Id. at 363.
\textsuperscript{106} Id. at 395.
\textsuperscript{107} See Nancy D. Polikoff, \textit{Updating the LGBT Intracommunity Debate Over Same-Sex Marriage: Equality and Justice for Lesbian and Gay Families and Relationships}, 61 \textit{Rutgers L. Rev.} 529, 537 (2009) (“Since at least 2004, the ‘marriage equality’ movement has become virtually synonymous with the gay rights movement, and the successes and failures of that movement over the last fifteen years have dominated all discussions of LGBT issues.”).
\textsuperscript{108} Yoshino wrote that while “[a] few decades [before the year 2000], explicit denial appear[ed] to have been fairly common even among academic theorists, some of whom believed that all self-identified bisexuals were actually homosexuals in denial[,] . . . . perhaps the more prominent form of denial [around the year 2000] the implicit one.” \textit{Id.} at 395.
Washington on behalf of Steven Apilado, LaRon Charles, and Jon Russ, three bisexual members of San Francisco Gay Softball League whose team, D2, advanced to the 2008 Gay Softball World Series in Seattle, an event run by the North American Gay Amateur Athletic Association (NAGAAA) which enforced a rule that no team participating in the World Series could have more than two heterosexuals.\(^{109}\) Washington’s public accommodation law prohibits discrimination on the basis of sexual orientation.\(^{110}\)

During the world series championship, another participating team had challenged the eligibility of D2 to play on the basis of the NAGAAA’s heterosexual cap of two team members.\(^{111}\) Despite the NAGAAA’s stated mission of promoting “amateur sports competition, particularly softball, for all persons regardless of age, sexual orientation, or preference, with special emphasis on the participation of members of the gay, lesbian, bisexual and transgender community,” five members of D2 were summoned by the NAGAAA to a room with over twenty-five people in front of whom the players were expected to answer “whether they were ‘predominantly attracted to men’ or ‘predominantly attracted to women,’ without the option of answering that they were attracted to both.”\(^{112}\) After the players answered these questions, “a panel voted on whether he was ‘gay’ or ‘non-gay’ . . . . refus[ing] to entertain the idea that the players could be bisexual.”\(^{113}\) Moreover, according to a NCLR press release, the NAGAAA responded to a player’s stating that he was attracted to both women and men, “This is the Gay World Series, not the Bisexual World Series.”\(^{114}\) The panel ultimately decided by vote that Apilado, Charles, and Russ were not gay.\(^{115}\) The panel also “recommended disciplinary measures against [the players,] their team, and the San Francisco Gay Softball League, including forcing . . . D2, to retroactively forfeit their second-place World Series win.”\(^{116}\)

This lawsuit has been called a “legal first”\(^{117}\) because it involves a

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\(^{110}\) See WASH. REV. CODE §§ 162.26.010, 49.60.215 (2009).

\(^{111}\) See Press Release, supra note 109.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Incidentally, it should be noted, too – as it is in NCLR’s press release – that all three of these players were non-white. The panel questioned two other members of D2, both of whom were white, and decided by vote that these players were gay. See id.

\(^{116}\) Id.

lawsuit for discrimination on the basis of sexual orientation filed against a group intended for mostly gays. But the suit is a first for another reason—in claiming discrimination on the basis of plaintiffs’ bisexuality, it highlights the difference between bisexuality and homosexuality.

2. This, That, and then This Again: Bisexuality and Same-Sex Marriage

Bisexuals have the right to marry in every state. After all, if the definition of a bisexual is someone who could be attracted to either someone of the same or opposite sex, a bisexual person who chooses to marry a member of the opposite sex has the same rights to marry as any heterosexual person. Because bisexuals could conceivably partner with either men or women, a bisexual who wishes to marry someone of the opposite sex can do so in every state, as any heterosexual can. Conversely, a bisexual who wishes to marry someone of the same sex confronts the same obstacles as a homosexual would, being able to marry in only six states and in the District of Columbia: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and California.

Because bisexuals do not appear to present any issues particular to their bisexuality with respect to the right to marry, bisexuals do not tend to play a role in the same-sex marriage debate. In fact, legend has it that at an
early rally for Freedom to Marry, “the leading campaign working to win marriage nationwide,” the organization’s executive director Evan Wolfson received an objection from a rally participant, asking “What about bisexuals?” In response, Wolfson admitted that were he to understand the particular problems bisexuals faced in the context of marriage (which he could not), he would incorporate them specifically into the organization’s effort to win marriage rights. Since this time, Freedom to Marry has included a page on its website entitled “Why Marriage Matters to the Bisexual Community,” which includes a quotation from Alan Hamilton, a former president of the East Coast Bisexual Network and a co-founder of the Unitarian-Universalist Bisexual Network, that reads as follows:

Think about it: Even a bisexual married to someone of another gender knows that her/his partner could die from an accident or disease and leave her/him alone. After recovering from that loss, their next relationship might be with someone of the same gender. She/he will want the same rights as they currently have in a mixed-gender relationship. A bi person who is dating or in a committed same-gender relationship also wants the same rights as straight-identified people. For all these reasons, bi people have been active in Freedom To Marry and the Equal Marriage movement since its inception, and continue their strong support.

Thus, marriage matters to the bisexual community because a bisexual person might enter into a same-sex relationship. Doctrinally, there was nothing unreasonable about Wolfson’s response at the early rally nor was there anything unreasonable about the way that his organization has since articulated the reason that bisexuals should care about equal marriage rights. The legal rights of bisexuals who wish to marry are, for the most part, the same as those of either heterosexuals or homosexuals who wish to marry, depending on the whether the bisexual’s marriage is to a member of the opposite or the same sex.

One of the reasons that bisexuals have been made invisible, particularly

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in the marriage context, is that there is no way to talk about their sexual orientation in a way that is separate from their partnership to one specific person. The example of Sandy Stier’s direct testimony from *Perry v. Schwarzenegger* exemplifies this point.129

A bit about the *Perry* case as it relates to the same-sex marriage debate: Proposition 8, a ballot proposition to amend the California Constitution by adding Section 7.5, which provides that “[o]nly marriage between a man and a woman is valid or recognized in California,”130 passed with 52.1% of Californians’ votes in the November 2008 election.131 Its passage effectively overturned the California Supreme Court’s decision in *In re Marriage Cases*,132 which held unconstitutional California’s previous statutory bans against same-sex marriage because “statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny”133 and that the statutory bans at issue in that case failed the strict scrutiny standard of review because the “the interest in retaining the traditional and well-established definition of marriage . . . [could not] properly be viewed as a compelling state interest for purposes of the equal protection clause, or as necessary to serve such an interest.”134

The plaintiffs in *Perry* argued that Proposition 8 was unconstitutional because it violated the Equal Protection Clause of the 14th Amendment.135 In *Romer v. Evans*,136 the Supreme Court invalidated Colorado’s Amendment 2, which would have prevented any Colorado municipality from recognizing homosexuals, lesbians, or bisexuals as a protected class,137 because it “seem[ed] inexplicable by anything but animus toward the class it affects” and therefore “lack[ed] a rational relationship to legitimate state interests.”138 When Judge Vaughn Walker, Chief Judge of the United States District Court for the Northern District of California,139

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129 See supra notes 8-15 and accompanying text.
133 *Id.* at 442.
134*Id.* at 401.
135 “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
137 *Id.* at 624.
138 *Id.* at 632.
found Proposition 8 unconstitutional, he found that “Proposition 8 was premised on the belief that same-sex couples simply [we]re not good enough as opposite sex couples . . . . [w]ether . . . based on moral disapproval of homosexuality, animus toward gays and lesbians or simply a belief that a relationship between a man and a woman [w]as inherently better than a relationship between two men or two women.”

Sandy Stier was married to a man. When Ted Olson asked her on direct examination to describe her sexual orientation, Stier responded, “I’m gay.” Stier claimed to have learned that she was gay “fairly late in life, in [her] mid-thirties.” She admitted that at the time she was married to a man – from 1987 to 1999 – she had no feeling that she was a lesbian. She admitted, too, that her marriage to this man “start[ed] out with the best intentions” and that she “love[d] him when [she] married him.” And though Stier met Kris Perry, a woman with whom she has been in a relationship for over a decade, in 1996, she stated that her “sexual orientation or [her] discovery of [her] sexual orientation ha[d] nothing to do with the dissolution of [her] marriage.” Nevertheless, when asked how convinced she was that she was gay, Stier answered: “Well, I’m convinced, because at 47 years old I have fallen in love one time and it’s with Kris.”

A couple of things are notable about Olson’s exchange with Stier. First, Olson wanted Stier to demonstrate that she was very convinced she was gay, undoubtedly because her sexual history suggested that she could switch the sex of her sexual partner unpredictably at any time. Second, in demonstrating that she was very convinced that she was gay, Stier presented the following argument:

I have been in love only once.
I have been in love with a woman.

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142 Id.
143 Id.
144 Id. at 165.
145 Id. at 165-66.
147 Id.
Therefore, I am capable of falling in love with women only.

Both Olson’s question and Stier’s answer demonstrate separate but related assumptions that have operated silently as a part of the fight for gay rights. Olson’s purpose in his examination of Stier, and in the context of the Perry lawsuit as a general matter, was to secure marriage rights for Stier, Perry, and the other plaintiffs who are parties to the lawsuit. And while same-sex marriage is a gay rights issue, it is worth noting that Olson has suggested through this line of questioning that Stier should be afforded marriage rights if and only if her gay identity is stable. It is not unreasonable for Olson to have asked Stier about her sexual orientation if reasonableness is determined by reference to what has been emphasized in other same-sex marriage lawsuits. In those lawsuits, courts have highlighted plaintiffs’ sexual orientations. And in highlighting plaintiffs’ sexual orientations in those other lawsuits, courts have highlighted plaintiffs’ homosexual orientations and have downplayed the extent to which plaintiffs have had opposite-sex relationships in the past. The assumption in same-sex marriage lawsuits seems to be that plaintiffs should identify not only as members of same-sex couples but also as homosexual individuals.

Stier’s answer to Olson presents an additional opportunity to unearth an assumption that has animated same-sex marriage litigation. That is the assumption that an individual’s attraction to one specific person demonstrates the individual’s attraction to other people who possess the person’s sex characteristic. For illustrative purpose, consider for a moment if Olson had asked Stier not how convinced she was that she was gay but instead how convinced she was that she would always be attracted to people with green eyes. In order to demonstrate to Olson that she was very convinced of this fact about herself, Stier’s answer would take the following logical form if she employed the same logic when answering this question as she had when answering Olson’s question about her sexual orientation:

I have been in love only once.
I have been in love with a person with green eyes.

Therefore, I am capable of falling in love with people with green eyes only.

When framed this way, Stier’s response seems strange. After all, it is very common to hear that an individual has partnered with someone who is not her “type.” Moreover, if an individual partners with someone who is not her type, she is not expected to change her type but can comfortably
articulate that while she is typically attracted to people with blue eyes and continues to be, she has chosen to partner with someone with green eyes. When the characteristic is eye color, or even race, an individual can talk about the difference between her general “type” and the characteristics of her partner to explain a difference between the two, if one exists.

But the rationale that Stier offered to substantiate her lesbianism signifies an assumption that rests at the core of the current conception of sexual orientation. Stier testified that because she had fallen in love only once, and because she had fallen in love with a woman, she was convinced that she was gay. It may be that Stier felt a more profound love for Kris Perry than she had felt for her late husband. But the way that Stier presented evidence of her sexual orientation demonstrated that she believed something to be true intersubjectively, and that is that being (generally) gay and being attracted to a specific, single member of the same sex are connected.

Though she may have answered truthfully (and my purpose here is not to suggest otherwise), Stier’s testimony raises some questions about the presumptions that she and others seem to have about sexual orientation. I do not mean to question Stier’s sexual orientation as a point of fact. I do not mean to suggest that because Stier had relationships with at least one member of each sex that she must be bisexual. It is, of course, possible that she discovered that she was a lesbian later in life and after that discovery identified that way. I take seriously Stier’s self-identification and so would classify her as a lesbian if she so identified so my critique is not of the validity of Stier’s sexual orientation.148

It is not surprising that on direct examination Perry, Stier, and other plaintiffs were asked about their sexual orientations and about the sexual orientations of their partners.149 After all, because the plaintiffs in Perry sought to invalidate Proposition 8 because it discriminates against people on the basis of their sexual orientation, these are important questions for Boies and Olson to ask their clients. The answers to these questions were, for the most part, unremarkable, at least at first blush. For example, when Boise asked plaintiff Jeffrey Zarrillo, “Are you gay?” Zarrillo responded, “Yes, I am” and responded to Boise’s next question, “How long have you been gay?” by saying, “As long as I can remember.”150 When Olson asked

148 Zak Kramer and I have criticized antidiscrimination law for its failure to take into account a plaintiff’s sense of self. See, e.g., Elizabeth M. Glazer & Zachary A. Kramer, Transitional Discrimination, 18 TEMP. POL. & CIV. RTS. L. REV. 651 (2009); Glazer & Kramer, Trans Fat, supra note 39.
150 Id. at 77.
Zarrillo about the sexual orientation of his partner, Paul Katami, by asking, “Now, today, you are in a committed relationship with another gay man, correct?” Zarrillo responded in the affirmative.\footnote{Id. at 79.} Boies addressed Katami’s sexual orientation by asking him on direct examination, “Now, you say you were a natural-born gay. Does that mean you’ve always been gay?” to which Katami responded, “As long as I can remember, yes.”

When questioning Kris Perry, Olson asked her, “How would you describe your sexual orientation?” to which Perry responded, “I am a lesbian.”\footnote{Id. at 140.} Olson then pursued a line of questioning with Perry, asking her to address the mutability of her sexual orientation, asking whether she thought that she had been born with her lesbian sexual orientation, and whether she thought that it could ever change.\footnote{Id. at 140-41.}

Others have and likely will continue to criticize the Perry case,\footnote{See, e.g., Posting of Nan Hunter to hunter of justice, http://hunterforjustice.typepad.com/hunter_of_justice/2009/08/my-top-three-questions-about-the-perry-case.html (Aug. 23, 2009, 23:23 EST) (asking, inter alia, “[w]hat will the ramifications (if any) be of placing control of one of the biggest LGBT rights lawsuits ever filed in the completely private, non-transparent realm of big firms?”); Jesse McKinley, supra note 9.} particularly if the case reaches the Supreme Court as it is expected to.\footnote{See, e.g., Margaret Talbot, A Risky Proposal: Is it Too Soon to Petition the Supreme Court on Gay Marriage?, THE NEW YORKER, Jan. 18, 2010, available at http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot (“On January 11th, a remarkable legal case opens in a San Francisco courtroom—on its way, it seems almost certain, to the Supreme Court.”).} These critiques have largely targeted the filing of the lawsuit in federal court, arguing that extending the right to marry to same-sex couples can be achieved incrementally,\footnote{Bill Eskridge has argued that the most successful route to same-sex marriage is one of incremental change. See WILLIAM N. ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2001).} and therefore at the state and not the federal level. This Article takes Perry as its starting point, but not, as most commentary on the case has, in order to criticize the filing of the case. When the characteristic is sex, for some reason an individual will have difficulty explaining the difference between her general type and the sex of her partner. One might argue that sex, unlike eye color or even race, is not a type. Sex, one might say, is the essential characteristic on the basis of which individuals choose to associate intimately. For many—and for bisexuals—this is simply not true.
D. The Proliferation of Bisexuals

When Yoshino offered his account of bisexual erasure, he noted that bisexuals were invisible because they were being erased, not invisible because they did not exist. Yoshino defined bisexuality by reference to an individual’s desire to act sexually with members of both sexes as opposed to an individual’s sexual conduct with members of both sexes.\textsuperscript{157} He employed this definition of bisexuality because, if one conducts as he did an inquiry into their erasure, “the inquiry was whether they were forgoing something rather than whether they should be forgoing it,”\textsuperscript{158} namely their same-sex desire. Yoshino recounted the major sexuality studies which demonstrated “that the incidence of bisexuality was greater than or comparable to the incidence of homosexuality.”\textsuperscript{159} As Nan Hunter reported recently, a national sex survey conducted by Indiana University found that approximately seven percent of the population currently identifies as non-heterosexual and forty percent “of the men and a big majority of the women in that group self-describing as bisexual.”\textsuperscript{160} There have also been notable studies conducted of people who identify as bisexuals but are married and monogamous,\textsuperscript{161} as well as many very recent examples of celebrities coming out as bisexual, acting bisexual in public settings,\textsuperscript{162} and writing songs that speak of bisexual activity.\textsuperscript{163}

My personal intuition is that the next generation will shock its parents not by coming out as homosexual or even bisexual, but instead by eschewing labels entirely. Some of that intuition is, as intuitions are, unsubstantiated, but some derives from evidence about reports on the sexuality of those who make up what has been dubbed the “post-gay generation.”\textsuperscript{164} The Cuddle Puddle was not the most popular clique at Stuyvesant High School in 2006, but they were not outcasts either. Whereas ten years prior in the same high school halls “you might have found a few goth girls kissing goth girls, kids on the fringes defiantly bucking the system,” the Cuddle Puddle was “a group of vaguely

\textsuperscript{157} Yoshino, supra note 1, at 373.
\textsuperscript{158} Id. at 374.
\textsuperscript{159} Id. at 380.
\textsuperscript{161} See supra notes 25-26 and accompanying text.
\textsuperscript{162} See supra note 31 and accompanying text.
\textsuperscript{163} See Katy Perry, I KISSED A GIRL (Capitol Records 2008) (“I kissed a girl and I liked it . . . I hope my boyfriend don’t mind it”); The Veronicas, UNTouched (Sire Records 2008) (“I wanna kiss a boy . . . I wanna kiss a girl”).
\textsuperscript{164} See Morris, supra note 27.
progressive but generally mainstream” seniors and juniors like Alair, who was “well known” and well-liked at school. In this clique, “[w]here are girls petting girls and girls petting guys and guys petting guys,” and they shunned labels. Ilia, a member of the Cuddle Puddle, explained that the orientation of the group was “not lesbian or bisexual. It’s just, whatever . . .”

II. SEXUAL REORIENTATION

Understanding sexual orientation to fit within a rigid binary has been deemed problematic because that binary is too rigid to capture the actual human experience of sexual orientation, which is dynamic and fluid. This Part begins with a story—my own—so as to incorporate into a new sexual orientation framework the human element that has been missing from earlier frameworks. Part II.B sets out this Article’s chief contribution: new terminology that captures accurately the dynamic nature of a bisexual orientation. This innovation expresses sexual orientation by referring to an individual’s status as well as her conduct, and by referring to the individual as well as to the couple, debates within legal scholarship about sexual orientation law that are elaborated in Parts II.C and II.D, respectively. Though words alone cannot solve the problem of bisexual erasure, Yoshino argued when he identified the phenomenon of bisexual erasure, that it “can be most easily explained by the fact that bisexuality is not part of our . . . semantic stock.” The separation of sexual orientation into two subcategories—general and specific—is meant to address this deficit in our semantic stock. Part II.E discusses the importance of stocking semantics.

A. My Story

It is impossible to know what Sandy Stier was really thinking. Her answer to Ted Olson might have been completely genuine. Unfortunately, based on a transcript of her testimony alone, meaningful conclusions about Stier’s sexual orientation cannot be drawn. Because the law concerns itself principally with arguments and statements of facts, more elaborate stories are not often told. Some legal scholars, on the other hand, have been telling stories for some time—their own and those of others. These scholars

165 Morris, supra note 27.
166 Id.
167 Yoshino at 460.
168 See, e.g., Robin West, Narrative Authority and Law (1993); Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411 (1989); Robert L. Hayman, Jr. & Nancy Levit, The Tales of White Folk:
have urged that “especially for vulnerable minorities,” stories can “make visible the experiences of outsiders.” 169 Nancy Levit has argued that storytelling has particular value in the fight for LGBT rights: “Presenting the stories of a wider variety of sexual minorities may be a promising litigation technique” that can help to “chang[e] the ways straight people think about gays, lesbians, bisexuals, and the transgendered.” 170 And Ruth Colker has argued that, as applied to the experience of bisexuality, storytelling is essential because rigid categories cannot adequately explain the fluid experience of bisexuality:

Categories suggest stasis whereas storytelling reflects our changing life experiences. The way for individuals’ sexual identity to become fully visible is not to embrace the new category of “bisexuality” but to explain fully the content of their sexuality. . . . [A storyteller’s] life description does a more complete job of explaining her sexuality than the label “heterosexual” or “bisexual.” This perspective does not force us to agonize over whether [the storyteller] properly could be considered a “bisexual” given the monogamous nature of her sexual relationship . . . . Applying or not applying the label “bisexual” to [the storyteller’s] situation would not add to our understanding of her sexuality. Individualized storytelling, however, makes it clear how her sexuality differs from another woman who has also been married to the same man for three decades but who openly acknowledges that she organizes her sexuality around the biological sex of her partner. 171

Thus while stories are a valuable way of understanding better the experiences of minorities whose voices are not adequately represented otherwise, stories are particularly valuable when their tellers do not fit neatly into categories. Stories convey the blurriness that categories by their nature obscure. Because sexual orientation is inherently dynamic, Colker argued that stories are particularly useful in understanding the true nature of someone’s sexual orientation. Colker told her own story to demonstrate her point:

When I ended an intimate relationship with a woman and

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169 Levit, supra note 34, at 38-39.
170 Id. at 42, 63.
171 COLKER, supra note 3, at 19.
began dating a man about fifteen years ago, I remember telling him, “It’s important that you recognize that I am a lesbian.” I insisted on the lesbian label because I did not want to acknowledge to myself the dynamic nature of my sexual orientation. I thought I had to choose between being gay and straight and was having trouble reconciling the gender of my current partner with those choices. Five years later, when I became involved with another man, again ending an intimate relationship with a woman, I told a friend that I was sure that I was now a “heterosexual.”

And here is mine:

When I walked into Cans Bar last November, I did not even notice Sadie. I was there with Katie, a mutual friend, and we were there to meet a group of girls who were Katie’s childhood friends. I was told that all of the girls had boyfriends so it had not occurred to me that a potential partner might emerge from the group. Moreover, Sadie was a fair-skinned, short blonde with an hourglass figure. Had someone asked me to describe my “type,” I would have described a taller woman with a more athletic frame, a dark complexion, and dark brown hair. And even now, after nearly a year of dating Sadie, I would still describe my type in the same way. I find Sadie incredibly beautiful and I am more attracted to her than to any other person in the world. But if I see from afar two women on the street, one who looks like Sadie and one who is taller, boxier, and darker, I am more likely to notice the latter (unless, of course, I have forgotten my glasses and think that the former woman is actually Sadie). Sadie is not my type, but my type has not changed.

Some friends have told me that Sadie does not look like girls I would date. She does not. But those same friends, like many other people, understand that a type is something from which deviance can be expected when choosing a partner. And so it was unremarkable to them that I was attracted to Sadie. Sadie’s friends had a different reaction to the news that we had begun a relationship. An open-minded and politically liberal group, they did not shun her nor did they discourage her from leaving her boyfriend so that we could be together. But they were surprised. Sadie, for as long as they had known her, had been attracted to men. And even now, Sadie would admit that while she is more attracted to me than to any other person, she remains predominantly attracted to men. Sadie’s type is men.

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172 COLKER, supra note 3, at 17.
173 I have changed this name.
am not a man. Thus, I am not Sadie’s type. But when the characteristic of a potential partner is sex rather than height, build, size, or hair color, the concept of a type does not seem to apply in the same way as it does for these other characteristics. For this reason Sadie has had a much more difficult time explaining her attraction to me than I have had explaining my attraction to her.

Sadie holds on to her heterosexual identity, despite our relationship. She does not consider herself a lesbian because she had never been attracted to a woman before me and she does not experience attraction toward women other than me. But that causes her some inner tension, according to what she has told me and what I can intuit. She feels connected to her past, when she was everyone’s boy-crazy friend—she derived a piece of her identity from her attraction to men, and did not feel that her attraction to me negated all of that. And yet, she does not want to demonstrate to me or others that she does not feel entirely committed to me or to our relationship. She was surprised that she was attracted to me, because while she had not ruled out the possibility that she could ever be attracted to a woman, she never thought that she would be.

I began this section by admitting that I could not be sure what Sandy Stier was thinking. I can also not be sure what Sadie is thinking. Sure, we sleep next to each other and her name is always the first in the log of texts on my phone, but I cannot access her thoughts, as much as I might try. Thus I do not know whether Sadie would leave me for a man. Like, whether she would actually leave me for a man. Like, the man who has all of the qualities that no other man had, but I had, and so she decided to have sex with a woman because it was me. I wonder if I am her concession, her second best, the person she decided to date because she had not met any person before me who had those qualities. But had she met me at the same time—at the same instant—as the hypothetical man to whom she was physically attracted and seemed to understand her in the way that she perceived me to have, I wonder if she would have noticed him and not me. Or whether she would have noticed him and me, but would have then chosen him because ultimately, she is straight. Sometimes when we are having sex I wonder if she is thinking about someone else, and if that someone else is male.

That is difficult for me. So difficult, I guess, that I was motivated to find a way to resolve her inner tension by constructing a new framework

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174 It should be noted that I have not said here that I am a woman. As I have alluded to in other writing, I reject the notion of the gender binary. See Glazer, Name-Calling, supra note 22 (arguing that the prevailing custom in law school classrooms for professors to call on students by reference to a gendered title (e.g., Mr. or Ms.) followed by their last names promotes unconscious biases on the basis of gender).
with which to think about sexual orientation. But there are times when I feel like Professor Yoshino must have felt on the first day of his Sexual Orientation and the Law seminar. I can intellectualize Sadie’s attraction and commitment to me despite her previous heterosexual relationships, but then wish that she would tell me that she never liked sex with her ex-boyfriend. I want to know for sure that she will never like another man again. I know that to some degree these thoughts have nothing to do with Sadie’s sexual orientation—I get jealous when I think of her having feelings for anyone but me. But I think that my jealousy is intensified by my inability to understand, emotionally if not intellectually, how Sadie could experience attraction to me but not to any other woman. Like Yoshino, I understand the naivety of the current conception of sexual orientation, but still fall back into the very unstable usage that I hope to retire.

B. Two Subcategories of Sexual Orientation (Or, How Frank Can Be Gay for Jamie)

Frank Rossitano, co-writer for The Girlie Show, the show-within-a-show on the television series 30 Rock, is straight. But when Jamie, a twenty year old coffee delivery boy, appeared in the office, Frank announced to head writer Liz Lemon, that he wanted to “hold [Jamie]” and “kiss him on the mouth.” Liz responded to Frank, by exclaiming, in order to voice her disbelief that Frank could feel sexually attracted to Jaimie: “Come on, you read Boobs Magazine!” And Lemon later explained to Frank, upon his reiteration of his attraction to Jamie: “No, that’s not a thing; you can’t be gay for just one person, unless you’re a lady and you meet Ellen.” At the episode’s end, Frank appeared in a scene in a gay dance club surrounded by men whom the audience was supposed to believe were gay. After dancing with the gay men in an effort to see whether he was attracted to other men, Frank concluded: “I’m not gay gay; I’m just gay for Jamie” to which his gay companions responded: “That’s not a thing.”

Tina Fey is always right, and the opinion she expressed in this episode of 30 Rock was no exception. Being gay for just one person is “not a thing.” And I do not intend to make it a thing in this Article. Though Fey, speaking through her character Liz Lemon, argued that it was impossible for Frank to be sexually attracted to Jamie because Frank was ordinarily attracted to women, she also admitted an exception to her own rule: a woman who met Ellen DeGeneres. Lemon might have been making reference by this admission to the widely held belief that women are more likely to harbor sexual attraction toward members of the same sex than are

175 See supra notes 16-20 and accompanying text.
176 30 Rock: Cougars (NBC television broadcast Nov. 29, 2007).
men,\textsuperscript{177} and was certainly making reference to DeGeneres’s ubiquitous appeal.\textsuperscript{178} Despite the fact that Fey was, of course, kidding, she was right. And to be sure, if this paragraph has not extracted all that was funny from Fey’s joke, the framework that this Article is about to introduce most certainly will.

As Fey argued, “that’s not a thing” to be gay for just one person, nor does this Article propose that it can or should be a thing. And while it may not be typical to find oneself attracted to a member of the same sex, it is certainly not unheard of. After all, it happened to Sandy Stier, to my girlfriend, and to Frank Rossitano. This Article introduces a distinction that might have obviated the issue that constituted the plot of Season Two, Episode Seven of \textit{30 Rock}. The distinction does, however, offer some advantages. This Article introduces a distinction between general and specific sexual orientations. An individual’s general orientation is the sex toward which the individual is attracted as a general matter. Thus, one’s general orientation is the orientation one harbors toward the 99.9 percent of the world with whom one is not partnered. An individual’s specific orientation is the sex of the individual’s chosen partner. Conflating these two subcategories of sexual orientation is a mistake not only because of the distress that it caused Frank, but also because of the way that conflating the two subcategories of orientation “fail[es] to respect sexuality’s fluid and narrative nature.”\textsuperscript{179}

Whereas an individual’s general orientation may be toward those with blue eyes, or women, or both men and women, that same individual’s specific orientation—the attraction the individual possesses toward the particular person or persons with whom the individual has chosen to partner—may be toward someone with blue eyes, or a man, or a woman. The distinction between one’s general “type” and the type into which one’s partner would fit—when the two differ, as they sometimes do—is an unremarkable distinction when applied to a partner’s characteristics that are not the partner’s sex. Moreover, the individual who likes people with brown eyes does not feel pressure to then declare that the individual likes people with blue eyes after partnering with a blue-eyed someone. However, when a woman partners, for example, with a woman when she has previously partnered with a man, there seems to be pressure on her to

\textsuperscript{177} See, e.g., Leonard Sax, \textit{Why Are So Many Girls Lesbian or Bisexual?}, PSYCHOLOGY TODAY, Apr. 3, 2010 (arguing that girls are becoming lesbians because guys their age are “losers”).


\textsuperscript{179} Yoshino, supra note 1, at 461.
reorient herself sexually, declaring that she is gay as opposed to either hetero- or bisexual. Of course, the woman may argue that she is not bisexual, but did discover her sexuality later in life, as a result of meeting a woman with whom she desired to partner. I do not mean to argue that she is lying or that a discovery of one’s general orientation is impossible. I mean to argue only that the available vocabulary for talking about sexual orientation does not capture the experience of someone who believes that she is heterosexual or bisexual but is currently partnered with a woman.

Currently, sexual orientation is understood along a variety of axes — gender is of course the most obvious, but others include age, species, fetish, power, and number. Oddly, it is to a certain extent taken for granted that individuals who possess a sexual orientation enter into relationships. But once individuals do enter into relationships, their sexual orientation becomes irrelevant because we assume that their orientation conforms to the orientation that this partnership signals. This was the phenomenon about which Mezey spoke when she observed “how often and how easily ‘bisexual practices’ are absorbed into both heterosexual and homosexual identities.”

Thus, sexual orientation is currently understood by reference only to an individual’s single existence, or alternatively by reference only to an individual’s partnered existence. The current understanding falls apart, however, when applied to the obvious reality that individuals exist as individuals but also as partnered people. And though Mezey focused on bisexual practices, it should be noted that the benefit of this alternative framework extends to non-bisexuals, as well. Had Frank (and Liz) considered that it was possible for Frank to identify as heterosexual but feel sexually attracted to Jamie, he might not have felt the need to test his general orientation on the basis of his crush on Jamie.

I admitted earlier that at times, in the context of my relationship, I feel like Yoshino must have when he could not escape the very binary he set out to reject. I feel that way again as I propose this alternative framework for sexual orientation. One might read this Article to propose the sort of rigid binary, categorical structure that this Article argues against. And one might argue further that this aspect of the proposal undermines it. However, the project of increasing bisexual visibility is one that has generated these sorts of hypocritical responses from all of those who have attempted it. Mezey admitted that, when trying to promote bisexual visibility, “[t]he challenge, finally, is pragmatic: to craft a reformulated vision of sexual identity that is both socially feasible and politically viable. . . .” Colker conceded that

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180 Mezey, supra note 4, at 99.
181 See supra note 175 and accompanying text.
182 Mezey, supra note 4, at 133.
“[c]ategorization under the law. . . is inevitable.” And Yoshino explained why his own logical and precise approach to sexual orientation was, while arguably an ironic way of approaching something that defies logic, a way of compensating for that defiance:

The logical approach of the article may be read as compensation for the often parlorously imprecise terms in which debates about sexuality in general and bisexuality in particular are conducted. Yet the fact that it may also be read as overcompensation is important. Sexual identity has always struck me as a kind of illogic, given that sexuality is such a powerful solvent of identity, a modality that expands the consciousness through shock and surprise. If this is right, then bisexuality may be the sexual identity that best reflects the oxymoronic nature of all sexual identity, insofar as bisexuality, too, is a contradiction, a class and its own dissolution. . . .

If we are concerned about the ‘logical’ regulation of sexuality as failing to respect sexuality’s fluid and narrative nature, we might do worse than to begin by looking at the sexual identity—bisexuality—that best represents that nature.  

Like others who have engaged with the topic of bisexuality, I wish to admit openly that in order to expose what has been rendered invisible, I have appealed to the most salient aspect of the current understanding of sexual orientation. “If you can’t beat them, join them.” One might argue that the categorical approach of this Article’s proposal is hypocritical. One might alternatively argue that this characteristic increases the proposal’s likelihood of adoption into the general vocabulary and collective consciousness.

C. Status Versus Conduct

Yoshino observed that one of the reasons for the erasure of bisexuals by homosexuals was “a desire to retain the immutability defense[, which] has

\footnote{183 COLKER, supra note 3, at xiii.}
\footnote{184 Yoshino, supra note 1, at 461.}
\footnote{185 This footnote might be superfluous but this phrase is considered a proverb whose earliest citation, in the form, “If you can’t lick ‘em, jine ‘em,” appeared in the Atlantic Monthly in February 1932. See Fred Shapiro, Quotes Uncovered, NYTIMES.COM, Nov. 19, 2009. And for a discussion of the overuse of footnotes in law review articles, see Joan Ames Magat, Bottomheavy: Legal Footnotes, 60 J. LEGAL EDUC. 65 (2010).}
exonereeative force because of the widely held belief that is abhorrent to penalize individuals for matters beyond their control.”

Because the bisexual chooses between the sexes when choosing a particular partner (or so the theory goes), the homosexual who does not have the same choice has an incentive to erase the bisexual because the bisexual threatens the believability of the homosexual’s claim that homosexuality is immutable. Immutability is important to homosexuals as a matter of constitutional doctrine because the third element in the test conducted to determine whether a group constitutes a suspect class is whether the group has a common immutable characteristic. This is the test conducted to determine whether a group merits Equal Protection analysis.

The importance of immutability has been contested widely, particularly in the sexual orientation context. Though not identical, the debate about the importance of the immutability defense to combat discrimination on the basis of sexual orientation is closely related to another debate within this area of law, namely the debate about whether to characterize sexual orientation on the basis of status or, instead, conduct. If one’s sexual orientation is immutable, then discrimination for being gay or lesbian (or bisexual, at least in theory) should be prohibited. Tying protections to particular behaviors is not necessary under this theory because any discrimination against someone on the basis of their sexual orientation status should be illegal. Naomi Mezey argued for a classification system for sexual orientation that was based on acts as opposed to identity. Her reasons for so arguing were convincing, but as she undoubtedly knew, there is a high cost associated with moving to a sexual orientation classification system based on acts alone. Other scholars have also argued for the importance of conduct-based classifications of sexual orientation (as well as other protected traits, such as sex and race).

In some of Yoshino’s other work, he has argued for the importance of protecting conduct, which I have summarized elsewhere as follows:

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186 Id. at 405.
187 Yoshino acknowledged the possibility that individuals could be immutably bisexual, but conceded that despite this possibility the bisexual would always be perceived to have had a choice about partnering. See id. at 405-06.
188 See, e.g., U.S. v. Virginia, 518 U.S. 515 (1996) (the other elements of the test are whether the group has been historically disadvantaged and whether it is politically powerless).
190 See discussion supra Part I.B.2.
191 See, e.g., sources cited supra note 51.
Civil rights lawyers and scholars no longer worry about status discrimination, often referred to as “first generation” discrimination. In the “second generation” of discrimination law, the “smoking guns – the sign on door that ‘Irish need not apply’ or the rejection explained by the comment that ‘this is no job for a woman’ – are largely things of the past.” The move from first to second generation discrimination has been characterized as “progress: individuals no longer need[] to be white, male, straight, Protestant, and able-bodied; they need[] only to act white, male, straight, Protestant, and able-bodied.”

Classifying sexual orientation on the basis of status and not conduct is risky because of the extent to which protections are tied to immutability and also because of the extent to which sexual orientation status does not reflect the actual experience of human sexuality. However, classifying sexual orientation on the basis of conduct and not status is also risky because it might be difficult to determine why some conduct and not other conduct is protected without reference to an individual’s sexual orientation status.

Distinguishing between general and specific orientations is appealing because it characterizes sexual orientation by referring to an individual’s status as well as the individual’s conduct. An individual’s general orientation can be heterosexual, homosexual, or bisexual while the same individual’s specific orientation might express the individual’s act of partnering with someone who the individual might not have been attracted to as a general matter.

D. Individual Versus Relational Identity

A longstanding debate has existed about how to manage the tension between individual and group rights. Group rights and individual rights are “[b]y their nature, . . . intertwined.” But group and individual rights are not identical to each other. “For example, an individual qua individual cannot demand self-government for herself only. But individuals can speak on behalf of their group. Thus, an individual Native American can assert a moral claim on behalf of her tribe, such as a moral claim to institutionalize

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194 Id. at 1284.
Native-American self-rule.”

This debate, and the tension that goes along with it, have found particular application in legal scholarship concerning the rights of gays and lesbians. It is of course possible to conceive of gay or lesbian identity individually (i.e., one individual person can be gay or lesbian), but commentators have identified a few reasons that it might make sense to conceive of these identities relationally instead of individually. Consider, for example, the public accommodations context. Both Sandals Resort and eHarmony at one time had policies that discriminated against potential customers on the basis of sexual orientation. At Sandals, a resort for couples, the policy prohibited any person from sharing a hotel room with a member of the same sex. On eHarmony, a dating website, members could not search the website for members of the same sex. While both companies eventually changed their policies, each argued initially that its policy did not violate public accommodation laws that prohibited discrimination on the basis of sexual orientation because it did not deny access to gays or lesbians. A gay or lesbian guest could stay at a Sandals resort or search for potential partners on eHarmony, the companies argued respectively, so long as the guest or member stayed with or searched for a member of the opposite sex, as the case may be. As Holning Lau has argued, the problem with Sandals’ and eHarmony’s response was that it was not unreasonable under an individualist conception of sexual orientation. If the unit for purposes of analysis is the individual, Sandals and eHarmony’s policies did not deny access to gay individuals. Lau proposed to change the analytical unit for purposes of public accommodations law from the gay individual to

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195 Id. (citing Peter Jones, Group Rights and Group Oppression, 7 J. Pol. Phil. 353, 354-55 (1999)).
196 See, e.g., Lau, supra note 52.
An individualist account of sexual orientation takes the individual as the analytical unit. This account makes intuitive sense because not every person who is gay is a part of a gay couple. However, because—as Mary Anne Case has argued, “[a]t some point, it seems, almost definitionally, coupling or the desire to couple must figure in same-sex orientation. In the words of the adage, ‘It takes two women to make a lesbian’”—it also seems to make some sense to analyze at least some forms of discrimination against people on the basis of sexual orientation by reference to the couple instead of the individual.

For the purpose of engaging with this Article, one need not pick between the individual and the couple as analytical units. It merely bears notation that distinguishing between general and specific orientations satisfies concerns on both sides of this debate. One’s general orientation describes one’s individual sexual orientation, whereas one’s specific orientation describes one’s sexual orientation once coupled.

E. Naming’s Necessity

This Article may be perceived to offer something very small, for it simply introduces new names for subcategories of sexual orientation that simply describe the way that individuals already live their sexual lives. But the act of naming can be a transformative, albeit procedural, step in the process of understanding the substance of concepts that are named. Mihaly Csikszentmihalyi, regarded as one of the pioneers in the exploding field of happiness studies, commented on the fundamental importance of naming by invoking basic and powerful biblical examples:

The simplest ordering system is to give names to things; the words we invent transform discrete events into universal categories. The power of the word is immense. In Genesis 1, God names day, night, sky, earth, sea, and all the living

198 Lau, supra note 52.
199 Case, supra note 52, at 1650.
things immediately after He creates them, thereby completing the process of creation. The Gospel of John begins with: ‘Before the World was created, the Word already existed . . .’. All these references suggest the importance of words in controlling experience. The building blocks of most symbol system, words make abstract thinking possible and increase the mind’s capacity to store the stimuli it has attended to. Without systems for ordering information, even the clearest memory will find consciousness in a state of chaos.

In the sexual orientation context, the names that authors use to identify those about whom they write diverge widely, and differ markedly from names used in earlier writing. Rhonda Rivera wrote about “homosexuals.” Bill Eskridge has written about “gays.” Mary Anne Case has written about “gays and lesbians.” Chai Feldblum has written about “LGBT” people. Nancy Knauer has written about “queers,” a term she characterized as “the latest politically correct term to come from a movement that has advanced from ‘homosexual’ to ‘homophile’ to ‘gay’ to ‘lesbian and gay’ to ‘queer’.” Holning Lau has written about the “sexual minority,” and later about “SOGI minorities.”

To focus on one example, today, the word “homosexual” is one that is most often heard spoken by people who hate him, who think he is ill, or that he has an “agenda.” A search of law review articles that contain

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204 See Chai Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, 72 Brook. L. Rev. 61, 63 (2006) (“I first want to make transparent the conflict that I believe exists between laws intended to protect the liberty of lesbian, gay, bisexual, and transgender (‘LGBT’) people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws.”).
206 See Lau, supra note 52, at 1273 n.9.
209 See Lawrence v. Texas, 539 U.S. 558 (2003) (“Today’s opinion is the product of a
the word “homosexual” in their titles reveals a decline in the early nineteen nineties.\textsuperscript{210} One might argue that the name “homosexual”—as opposed to other names that authors and advocates have used—has a particular quality about it. A recent poll conducted by CBS News and the \textit{New York Times} showed that while 59\% of a random sample of 1,084 adults nationwide said they supported “homosexuals” serving in the military and 34\% strongly favored the same, 70\% said they supported “gay men and lesbians” serving in the military and 51\% strongly favored the same.\textsuperscript{211} In addition, the term may have particular appeal to an older generation.\textsuperscript{212}

But “homosexual” is not the only name that authors and advocates in this field have abandoned. Even the abbreviation that includes lesbian, gay, bisexual, and transgender people—“LGBT”—has been criticized for not being inclusive enough.\textsuperscript{213} The shift in naming trends in this area of scholarship may explain the presence in nearly every article of a qualifying footnote presenting to its reader “a note on terminology”\textsuperscript{214} in which its author sets forth definitions with which the author circumscribes the individuals whose protection the article addresses. Those qualifying footnotes become throat-clearing exercises with which scholars begin their

\textsuperscript{210} This conclusion was derived from a Lexis Nexis search conducted on March 22, 2010 using the search terms, “TITLE(homosexual)” generating 176 results.


\textsuperscript{212} See Todd W. Rawls, \textit{Disclosure and Depression Among Older Gay and Homosexual Men: Findings from the Urban Men’s Health Study in GAY AND LESBIAN AGING: RESEARCH AND FUTURE DIRECTIONS} (Gilbert and Brian de Vries, eds., 2004) (finding that 21\% of older gay men studied thought of themselves as homosexual rather than gay or queer or some other classification, and moreover, that 16.5\% of men in their fifties, 19.8\% of men in their sixties, and 51.3\% of men age seventy or older thought of themselves as homosexual).

\textsuperscript{213} See Lau, supra note 207.

lectures, defining the name that they will use and explaining why that name, as opposed to alternative choices, is the preferable name for the relevant constituent group. Of course, defining terms is common in many areas of academic discourse. But there are some notable differences between the issue of naming in other legal or academic scholarship and in scholarship about the law as it relates to sexual orientation and gender identity.

First, there seems to be an anxiety that attends the writing of the qualifying footnote or the throat-clearing exercise. The hope seems to be that readers or audience members will agree with a scholar’s name choice and will not discount the substance of her article or talk on the basis of choosing a name that has fallen out of fashion. Second, the name choice in this area of scholarship is not merely stylistic but substantive. This second difference relates to the first; if choosing an unfashionable name was only a difference in style and not substance, query whether the scholar would care whether others agreed with her name choice.

The idea that naming is substantive is not new. Philosophers of language have for some time recognized and debated the importance of naming. John Searle and Saul Kripke have debated the extent to which names are merely descriptions of things or are instead things in themselves. Searle argued that it is a necessary truth, for example, that Aristotle has the properties commonly attributed to Aristotle such as being the teacher of Alexander the Great. Kripke argued in contrast that names must be “rigid designators,” meaning that they have the same meaning in all possible worlds. In this way naming was, for Kripke, necessary rather than contingent. They were contingent facts that Aristotle taught Alexander the Great, that Hitler was the man who succeeded in having more Jews killed than anyone else in history, or that a yard is the distance when the arm of King Henry I of England was outstretched from the tip of his finger to his nose. But when referring to Aristotle, Hitler, or a yard in a...
counterfactual sentence (e.g., “Suppose Hitler had never been born”), the name (“Hitler”) still refers rigidly “to something that would not exist in the counterfactual situation described.” The name Hitler refers to something even though characteristics thought to be essential to Hitler could not be true if Hitler had never been born. Thus the name Hitler must rigidly designate the man Hitler because sentences presenting counterfactual situations continue to have meaning.

It is not my position that legal scholarship about issues that relate to these groups—whatever an author chooses to call them—needs to refer to them by only one name. It is also not my position that one particular name is better than another. But names are important. While this Article cannot capture fully the debate amongst philosophers of language about the nature of naming, the existence of the debate suggests the importance of naming. Just because naming is basic – naming our children, our papers, and maybe even our cars—is often the first step we take to give them life and to make them our own – does not mean that authors’ name choices do not affect the substantive nature of their claims. Of course, in some instances scholars of sexual orientation and gender identity law specifically delineate particular sexual minorities on which to focus their writing. However, in other instances the name choice is not made because of a particular focus and is – and this is the problematic point – not discussed.

This Article, which addresses bisexuality, has proposed a name change to delineate subcategories within sexual orientation. Because naming is the first step toward making visible those who is not, and making people visible is arguably the first step in securing for them civil rights, this Article has perhaps proposed something pretty important. An open discussion about naming might spur an open discussion about whether and how, for example, the rights of bisexuals and transgender individuals can or should be taken into consideration. After all, if one chooses the name “gays and lesbians” as opposed to “LGBT” or “SOGI,” one makes a choice about who is

221 Id. at 78.
222 Bill Osinski, 4-Wheeled Love Affairs; Some Folks’ Cars are Pampered Family Members, THE ATLANTA JOURNAL-CONSTITUTION, Feb. 4, 2009 at 1JJ (“‘Historically, it’s been true of a lot of Americans that they develop very personalized relationships with their automobiles . . . . If you do things like naming your car or decorating the dashboard like your fireplace mantel, you make it more than a piece of hardware.’”).
223 See, e.g., Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 COLUM. J. GENDER & L. 392 (2001); (on transgender individuals); Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 ARIZ. L. REV. 265 (1999) (on intersexed individuals); Zachary A. Kramer, supra note 56 (on heterosexuals); Yoshino, supra note 1 (on bisexuals).
224 See supra note 21 and accompanying text.
included and excluded from one’s domain. But only once we initiate a widespread conversation about naming can we highlight the substantive issues embedded in the names we choose.

III. THE REWARDS OF REORIENTATION

Sexual reorientation has its rewards. This Article has argued already that distinguishing between general and specific sexual orientations will ameliorate the problem of bisexual erasure. Increasing bisexual visibility will also help to debunk myths commonly held about bisexuals, clarify the purpose of the LGBT rights movement, and bridge diametrically opposed side of the stalemated same-sex marriage debate. This Part explains how making this distinction can help to achieve these additional benefits.

A. Reevaluating the Purpose of the LGBT Rights Movement

Anyone who has tried to research bisexuality will understand immediately the uncertainty cost of bisexual invisibility. Inputting the search term “bisexual” into any search engine will generate plenty of results, likely none of which will pertain to bisexuality in particular. The popularity of the LGBT initialism has caused most references to any member of a sexual minority to be references to “lesbian, gay, bisexual, and transgender” people. This effort to include—if only in name—bisexuals as a part of the political movement to fight discrimination on the basis of sexual orientation and gender identity makes it difficult to search for anything that affects bisexuals as opposed to other members of the larger community of sexual minorities.

Some might argue that the lack of information about specific problems that bisexuals face is not merely evidence of their inclusion in a broader catch-all phrase that has unfortunate consequences for Google, but is instead evidence that bisexuals actually do not face particular problems as bisexuals. While this Article has offered responses to this objection, it bears notation that in order to accept the argument presented in this Article, one need not be convinced that bisexuals face particular harms, legal or otherwise. Because bisexuals represent incarnate the very fluidity and dynamism that reflects the human experience of sexual orientation, this Article has argued that the law should incorporate into its understanding that human experience. And so should the LGBT rights movement.

The LGBT rights movement has in the past few years suffered some internal tension. The movement’s collective energy has been directed primarily toward the fight for same-sex marriage recognition, and much of its leftover energy has been directed toward ending discrimination in the
Each of these battles has involved the exclusion of at least one of the movement’s key constituents. Nancy Levit has observed that the pragmatic strategy for lawyers litigating for LGBT rights has been to use the “‘homo kinship’ model or ‘like straight’ logic to argue for parental rights or same-sex marriage.”

This logic dictates, for example, that LGBT rights lawyers should litigate cases in states where residents are more likely to agree that gays and lesbians should have the right to marry. This logic also dictates that lawyers arguing for LGBT rights should treat their cases like controlled experiments; only one factor—their clients’ sexual preference for members of the same sex—differentiates their clients from everybody else. Unfortunately, this logic has caused the movement for LGBT to exclude, at times intentionally, not only bisexuals but also transgender individuals.

If enacted into law, ENDA “would prohibit the states, as well as other employers, from discriminating against their employees on the basis of sexual orientation and gender identity.” ENDA was introduced in the House of Representatives by Representative Barney Frank on June 24, 2009 and in the Senate by Senator Jeff Merkley on August 5, 2009. In addition, previous versions of ENDA, which would have prohibited discrimination on the basis of sexual orientation but not gender identity, have been introduced in every Congress since the 103rd Congress, with the

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225 As has been mentioned earlier, the movement’s efforts have also been directed toward the repeal of the military’s DADT policy. The “Queen for a Day” exception to DADT might be said to advantage bisexuals, but bisexuality, to be sure, is just as prohibited in the military as homosexuality is. See supra note 33.

226 As is the unspoken custom when writing legal scholarship about sexual orientation, I provide a note on the terminology I will use in this Article. The initialism “LGBT” stands for lesbian, gay, bisexual, and transgender. While there are other terms available to refer to sexual minorities, I use “LGBT” because it is the most politically salient right now. Moreover, because I will make reference in this Article to the differing interests held by the individuals whose initials comprise this group (e.g., lesbians and gays versus bisexuals; lesbians and gays versus transgender people; bisexuals versus transgender people), referring to the movement for LGBT rights is useful. For a brief analysis of changes in naming this political movement, see Elizabeth M. Glazer, Naming’s Necessity, 19 TUL. J.L. & SEXUALITY 166 (2010).


228 Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity, 123 HARV. L. REV. 1803, 1803 (2010).

229 See id. at 1806 (citing H.R. 3017 § 2(2); S. 1584, 111th Cong. (2009)).
exception of the 109th Congress.\footnote{See id. at 1806 n.23 (citing Jill D. Weinberg, Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act, 44 U.S.F. L. REV. 1, 9-12 (2009)).}

The Human Rights Campaign (HRC) infamously supported a noninclusive ENDA, which prohibited discrimination on the basis of sexual orientation but not on the basis of gender identity, because HRC concluded that a more inclusive ENDA would not pass out of the House of Representatives.\footnote{See Laird, supra note 34.} HRC received a lot of criticism for its position on ENDA,\footnote{See HRC’s Up for More Peaceful ENDA Discourse, GOOD AS YOU, Mar. 26, 2009, available at http://www.goodasyou.org/good_as_you/2009/03/hrc-ts-up-for-more-peace-enda-discourse.html (last visited Sept. 17, 2010) (“Remember in 2007 when their failure to oppose a non-inclusive ENDA led many LGBT activists to Harangue/Ridicule [sic]/Challenge HRC? Well happily, the future seems more Hopeful Regarding Cooperation on passing an inclusive measure[,]”).} which it later reversed, explaining that its earlier opposition to a trans-inclusive ENDA “would do more to advance inclusive legislation.”\footnote{See HRC Finally Ready to Back Trans-Inclusive ENDA, QUEERTY, http://www.queerty.com/hrc-finally-ready-to-back-trans-inclusive-enda-20090326/.} Transgender and bisexual people are minorities among minorities. Their identities overlap to a certain extent with those of gays and lesbians but at times diverge. The debate over a trans-inclusive ENDA provided an opportunity for the LGBT rights movement to clarify its commitment to civil rights for people who are transgendered. But bisexuals continue to be left behind.

As has been conceded in this Article, it may be true that the harms bisexuals face are not materially different from those faced by gays and lesbians. As has been said before, the fluidity of bisexuality is reason enough to make it a more visible category within the law. But there is another compelling reason to learn to see bisexuals.

The LGBT rights movement is a movement for sexual freedom. If we assume that discrimination against gays, lesbians, and even transgendered people, it is worth asking why. Theorists of antidiscrimination law have asked this question of discrimination as a general phenomenon,\footnote{See, e.g., DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008); ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD (2007); Glazer & Kramer, Trans Fat, supra note 39.} favoring this inquiry to an inquiry about the nature of antidiscrimination law’s established identity categories (e.g., race, color, ethnicity, religion, sex, and in some cases sexual orientation). The purpose of such an inquiry is to think outside the boxes that categories provide in order to determine what is really wrong with discrimination instead of determining how to work with established protected identity categories. Anna Kirkland, in her book Fat
Within the LGBT rights movement, it is worthwhile asking the big question, namely what is really wrong with discrimination on the basis of sexual orientation or gender identity as opposed to determining in specific cases whether someone experienced discrimination on the basis of these characteristics. While the LGBT rights movement understandably has to make choices in specific cases about whom to represent, the movement operates problematically when those whom it has strategically chosen to exclude represent the aspect of the movement that is central to its core mission. If what is wrong with discrimination against sexual minorities is a distaste for difference in sexual preference and gender identity, then rendering bisexuals invisible is not merely a strategic exclusion—it is an exclusion that undermines the very reason for the movement.

B. Debunking Myths About Bisexuality

While bisexuals themselves may have been rendered invisible, myths about bisexuals are popular amongst both heterosexuals and homosexuals. Yoshino mentioned that “the stereotype of bisexuals as ‘greedy’ or ‘promiscuous’” and explained that the implication of such a stereotype was that “bisexuals . . . ask[] for more than their due,” because an individual’s “due” is to be attracted to only one sex, and really (because of the prominence of the norm of monogamy) only one person. He also mentioned that heterosexuals and homosexuals, in some cases, believed different stereotypes about bisexuals. For example, he observed that “[c]ommon straight stereotypes of bisexuals portray[ed] them as promiscuous, as duplicitous, as closeted, and especially as bridges for HIV infection from the ‘high risk’ gay population to the ‘low risk’ straight population.” This particular stereotype has become increasingly popular with the uncovering of men—and in particular, black men—who “are said to live on the ‘down low’ . . . in that they have primary romantic relationships with women while engaging in secret sex with men.”

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237 Yoshino, supra note 1, at 374.
238 Id. at 396 (citing Robin Ochs, Biphobia: It Goes More than Two Ways, in BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY 217, 227 (Beth A. Firestein, ed., 1996)).
Yoshino observed that homosexuals, too, attach to bisexuals a stigma “by characterizing individuals who self-describe as bisexual as going through a ‘phase’ that will end in monosexuality,” leading homosexuals to be “suspicious of those who claim bisexuality as a stable identity.” Sean Cahill, director of the National Gay and Lesbian Task Force Policy Institute, echoed these misconceptions about bisexuals when he said that, “[c]ontrary to common misconceptions, bisexuality is not the equivalent of sexual promiscuity” and “[a]lso contrary to misconceptions, bisexuality is not a transitional phase between heterosexuality and homosexuality.”

Because of the prevalence of myths about bisexuality, it is unsurprising that individuals shy away from identifying as bisexuals and that lawyers have not, until very recently, brought suit on behalf of bisexual plaintiffs. By increasing bisexual visibility, real bisexuals, rather than mythical bisexuals, can be seen. The terminology introduced in this Article is intended to make bisexuals and bisexuality more visible. The hope is that with the availability of words with which plaintiffs can talk about their dynamic and fluid sexual orientations, the lawyers who represent them can do a better job painting a more realistic picture of bisexuals.

C. Bridging a Gap in the Stalemate of Same-Sex Marriage Debate

Sources explaining the debate about legally recognizing same-sex marriage, a debate that has gone on for more than thirty-five years, are huge in number. Perhaps the most concise, and certainly the most entertaining, is “Eternity with Maggie Gallagher,” a very recent cartoon made by Rob Tisinai, a journalist who covers gay rights issues. The cartoon features Maggie Gallagher, a writer and the president of the

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240 Yoshino, supra note 1, at 398.
241 Cahill, supra note 12.
242 See discussion supra Part I.C.1.
243 See William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419, 1423 (1993) (“The intellectual debate over same-sex marriage in American law has been a twenty-year conversation . . . .”).
Institute for Marriage and Public Policy, standing at the gates of heaven where she meets St. Peter. Peter engages Gallagher in Socratic dialogue through which Peter demonstrates to Gallagher that her reasons for wanting to ban same-sex marriage are unconvincing. Of course, Gallagher does not admit her defeat but instead resorts to saying that Peter is a “hateful, intolerant, anti-religious bigot,” a refrain in the cartoon which is of course ironic because St. Peter is St. Peter.

MAGGIE: Hello Saint Peter. I am Maggie Gallagher. Can I go to heaven now?

PETER: Hello Maggie Gallagher. Tell me what you did with your life.

MAGGIE: I protected traditional marriage.

PETER: Traditional marriage?

MAGGIE: The kind in the Bible.

PETER: You mean like Jacob and his wives?

MAGGIE: Not that kind.

PETER: David and his concubines?

MAGGIE: Not that kind.

PETER: Stoning brides on their wedding day if they are not virgins?

MAGGIE: Not that kind.

PETER: Then what kind?

MAGGIE: The American kind. From the good old days.

PETER: When wives could not own property?

MAGGIE: Not that kind.

PETER: When husbands were allowed to rape and beat their wives?

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248 St. Peter is generally regarded as the guardian of the gates of heaven because Jesus gave him the keys to heaven. See Matthew 16:19 (“I will give you the keys to the kingdom of heaven; whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven.”) Because it is odd to imagine that heaven’s gates actually have keys, some have interpreted the reference to “keys” in this passage to mean the knowledge of how to enter the kingdom of heaven. See The Restored Church of God, http://www.thercg.org/questions/p184.a.html.

249 Socratic dialogue has been interpreted over time to mean a variety of different things. See Thomas D. Eisele, Bitter Knowledge: Socrates and Teaching by Disillusionment, 45 MERCER L. REV. 587, 588 (1994) (“Law teachers use a version of the Socratic method (or, perhaps better, several variants of it) . . . .”). I mean here a “search for truth . . . which . . . consisted a common, joint effort, undertaken in discussion together with similarly committed other persons—even if it sometimes took on a rather combative aspect.” JOHN M. COOPER, ED., PLATO: COMPLETE WORKS xix (1997).

250 Peter was the leader (or prince) of the twelve apostles of Jesus. He is said to have “cling[ed] with the greatest fidelity, firmness of faith, and inward love to the Saviour.” St. Peter, Prince of the Apostles, CATHOLIC ENCYCLOPEDIA, http://www.newadvent.org/cathen/11744a.htm.
MAGGIE: Not that kind.
PETER: When blacks and whites could not marry?
MAGGIE: Not that kind.
PETER: Then what kind of traditional marriage?
MAGGIE: My kind.
PETER: You want to impose your kind of marriage on everyone?
MAGGIE: No, that is not what I want. That is what they want.
PETER: Who?
MAGGIE: The gays.
PETER: The gays?
MAGGIE: The gays want to change the definition of marriage for everyone.
PETER: They do?
MAGGIE: Yes.
PETER: Do they want to make you marry a woman?
MAGGIE: No they do not.
PETER: Do they want to outlaw traditional marriage?
MAGGIE: No they do not.
PETER: Do they want to vote on your right to marry?
MAGGIE: No they do not.
PETER: I am confused.
MAGGIE: Oh you are a hateful, intolerant, anti-religious bigot.
PETER: What?
MAGGIE: [Nods.]

PETER: Did you do anything else?
MAGGIE: I helped children across America.
PETER: Did you feed them?
MAGGIE: No, I did not.
PETER: Did you clothe them?
MAGGIE: No, I did not.
PETER: Did you rescue them from the streets?
MAGGIE: No, I did not.
PETER: What did you do?
MAGGIE: I banned same-sex marriage.
PETER: I am confused.
MAGGIE: Oh, you are a hateful, intolerant, anti-religious bigot.
PETER: What?
MAGGIE: Every child deserves opposite-sex parents.
PETER: There are not enough opposite-sex parents willing to take in children.
MAGGIE: Not my problem.
PETER: Children in foster homes?
MAGGIE: Not my problem.
PETER: Children in orphanages?
MAGGIE: Not my problem.
PETER: Children sleeping on the streets?
MAGGIE: Not my problem.
PETER: What do you care about?
MAGGIE: Banning same-sex marriage.
PETER: Why?
MAGGIE: To protect the children?
PETER: I am confused.
MAGGIE: Oh you are a hateful, intolerant, anti-religious bigot. Can I go into heaven now?
PETER: [Hits his head in exasperation.]
MAGGIE: Is that a yes?

The debate about whether to extend marriage rights to same-sex couples is, at its root, caused by an anxiety about preserving the category of marriage. The erasure of the bisexual is caused by an anxiety about preserving the integrity of the monosexual identity categories, hetero- and homosexuality. And while categories are arguably inevitable, there is a certain irony in the invisibility of the bisexual from the same-sex marriage debate: because the bisexual exists in-between artificially constructed categories of sexual orientation, her existence cannot be explained or even verbalized within the artificially constructed category of marriage.

But appreciating the irony of the bisexual’s invisibility from the debate about same-sex marriage also presents an analytical opportunity: an opportunity to examine critically the limits of the current understanding of sexual orientation. That understanding is limited by an inability to distinguish between an individual’s general and specific desires in the event that the two differ. The fact that an individual desires members of the opposite sex and partners with a member of the same sex (or vice versa) need not require the individual to renounce her general heterosexual (or homosexual) orientation. And the fact that an individual desires members of both sexes but wishes to partner with one member of one sex need not

Naomi Mezey observed that “[t]he categories are also rhetorical, or discursive, in the sense that homosexuality and heterosexuality maintain their bipolarity through the very language that constitutes them, a language that represents and reproduces mutually exclusive identities within a system that purports to account for all possible choices.” Mezey, supra note 4, at 98.

Kant argued famously that the possibility of human experience depends upon the organization of thoughts into categories. See IMMANUEL KANT, CRITIQUE OF PURE REASON B 159 (Paul Guyer, ed., Cambridge 1997)
require the individual to renounce her general bisexual orientation. Disaggregating general from specific orientations can bridge polarized views on same-sex marriage.

While opponents of same-sex marriage have made exogenous arguments, as the transcript above demonstrates the nub of the debate between opponents and proponents of same-sex marriage is endogenous—that which proponents of same-sex marriage want legally recognized does not fit within the boundaries of what opponents deem the traditional definition of marriage.

The staunchest opponents of same-sex marriage advocate for the sanctity of marriage. The sanctity of marriage, for these advocates, depends upon the preservation of marriage as an institution to unite one man and one woman for life. Consider, for example, the official position statement on sexuality offered at the Southern Baptist Convention in 2006: “We affirm God’s plan for marriage and sexual intimacy—one man, and one woman, for life. Homosexuality is not a ‘valid alternative lifestyle.’ The Bible condemns it as sin.” According to the legal dictionary cited in *Baker v. Nelson* and *Jones v. Hallahan*, two early same-sex marriage cases, marriage was defined as “a civil status, condition, or relation of one man and one woman united in law for life . . . .” It has also been argued that “[t]he concept of marriage as a union between one man and one woman for life has been basic to so many civilizations that it has withstood numerous

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253 Andy Koppelman has argued that the same-sex marriage debate is really “two debates at once,” the first “a normative debate about what relationships to value or even sanctify,” and the second “a debate about administration—about which relationships ought to have legal consequences.” See Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 10 (2004). The exogenous arguments are those that fall into Koppelman’s second debate. These arguments include, for example, the promotion of an optimal environment to raise children, the promotion of procreation by the government’s endorsement of traditional civil marriage, the promotion of stability in opposite sex relationships if same-sex relationships are not recognized legally, and the conservation of state resources. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (considering and rejecting these and other arguments against same-sex marriage recognition).

254 See, e.g., Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 52 (1997) (“One of the central issues in the same-sex marriage debate is whether, as many thoughtful people believe, marriage is necessarily a relation between persons of different sexes.”).


256 191 N.W.2d 185 (Minn. 1971).

257 501 S.W.2d 588 (Ky. 1973).

attempts to dramatically alter its design.’’

The aspect of the definition that same-sex marriage’s staunchest opponents employ that consumes my own focus is that which unites two people to one another for life. Of course, high divorce rates undermine the extent to which this definition has practical application. That said, the debate about same-sex marriage is a debate not about the practical realities of marriage but instead its theoretical contours. Staunch opponents of same-sex marriage, when making endogenous arguments not to recognize it, call upon marriage’s Platonic ideal, at least as those opponents perceive it. And as a result, the debate about whether to recognize same-sex marriage has been stalemated since its inception. After all, that which proponents of same-sex marriage want recognized is something that opponents of same-sex marriage believe cannot fit within the very definition of marriage.

Settling stalemates is tough. It might even be impossible. Moreover, even if the debate was not stalemated by its content, it is unlikely that opponents of same-sex marriage will be convinced by anything in this Article, let alone this section. I understand all of that, but even so submit that in light of the extreme division between a Maggie Gallagher and an Evan Wolfson on the issue of same-sex marriage, there is not a lot to lose by submitting an idea to bring their respective sides of the debate even slightly closer together.

If marriage is the union of two people for life, even if those people must consist of a single man and woman pursuant to the traditional definition of marriage, it is worthwhile considering why an individual’s orientation toward anyone but his spouse relates at all to the concept of marriage. A union for life is, after all, a union that by definition excludes any person other than one’s spouse. For this reason, I submit that an individual’s specific orientation is the only subcategory of his sexual orientation that should matter within the marriage context.

One might argue that while one aspect of the traditional definition of marriage is the union of two people for life, an equally operative aspect of that same definition is the union of one man and one woman. Of course, I concede this point. I wish only to point out that this aspect of the traditional definition of marriage conflates individuals’ general and specific orientations. The idea that marriage can only unite two members of opposite sexes brings into the marital relationship other relationships (whether actual or hypothetical) that either spouse has had or might have. My point is simply that the invitation of these extramarital relationships into the very definition of marriage is antithetical to the letter, if not the spirit, of

the traditional definition of marriage.

I do not intend to persuade opponents of same-sex marriage, actually. I intend only to point out that by differentiating between general and specific orientations, common ground between same-sex marriage’s proponents and opponents can be unearthed. Both sides should value only an individual’s specific orientation, which is an analytically separate concept from the sex toward which a married individual is generally oriented.

CONCLUSION

Russell Robinson described “a light bulb turning on in [his] head” as he read Kenji Yoshino’s book Covering, which offered a theory about why discrimination on the basis of sexual orientation, among other traits, persisted even after the passage of statutes like Title VII which prohibited that sort of discrimination. Yoshino argued in Covering that in addition to protecting discrimination on the basis of being gay, antidiscrimination statutes like Title VII should protect discrimination on the basis of acting gay. And Robinson explained that the theory of covering—that because people are uncomfortable with minorities who act in a way that conforms to the stereotypes that are normally associated with their minority group, members of the group downplay those acts—“helped [him] to understand the deep-seated but hard-to-articulate feelings of dissatisfaction that lingered long after [he] had come out of the closet about [his] sexual orientation.” The feelings of dissatisfaction that Robinson experienced happened to him in places like his home and around people like his family. He described:

The conventional wisdom on coming out is that it is supposed to be a brand new day in one’s life or perhaps the beginning of a whole new life. It didn’t feel that way for me: Even though everyone in my life finally knew that I was homosexual, some of my closest relationships remained stunted and repressed, instead of becoming liberated. My frustration surfaced regularly in conversations with my parents because I did not feel free to share with them gay-related aspects of my life. Thus, they did not hear how I fell in love for the first time, how my partner was planning to move to Los Angeles to be with me, or how ultimately the


\[261\] Id.
relationship ended in sorrow. . . . As important as these life events were to me, I feared that sharing them with my parents would remind them of my orientation, make them uncomfortable, and at best draw an ambivalent response, rather than the compassion and empathy I sorely needed. As a result, my reflexive and unexamined instinct was to self-censor, to strip my conversations of anything “gay,” which denied my family the opportunity to hurt me – or to prove me wrong.\(^\text{262}\)

When the topic is sexual orientation, actors like the state or employers in contexts like the courtroom or the workplace seem to cause queer individuals the same sort of discomfort that they feel from their parents or partners in contexts like their homes or their bedrooms.

Earlier writing on bisexual invisibility, to which this Article responds, turned on a light bulb in my head when I began dating a heterosexual. The discomfort that she feels when people ask her whether she is gay now that she and I are dating is likely similar to the discomfort that Sandy Stier felt when Ted Olson questioned her sexual orientation on the first day of the Perry v. Schwarzenegger trial. And the reason that I feel uncomfortable any time she mentions her ex-boyfriend might be similar to the reason that the North American Gay Amateur Athletic Association disqualified the San Francisco Gay Softball League’s D2 team which counted among its members three bisexuals.

Bisexuality makes people uncomfortable. For that reason, those who have acted bisexually feel a pressure to explain their sexual behavior so that their only true orientation is toward members of the same sex as their current partner. And those who encounter people who have had sexual experiences with members of both sexes feel a pressure to do the same. As much as one believes, in the abstract, that it is possible to be attracted to members of both sexes—and I do—it is really hard to believe that when the person whose attraction is at issue is that of your partner. And what this Article has offered—a framework that names and divides sexual orientation’s subcategories—does not eliminate that discomfort. Introducing words that assign different names to the attraction that someone has toward you—her specific orientation—and the attraction she has toward the rest of the world—her general orientation—does allow the orientations to exist in separate conceptual spaces. This way, a heterosexual’s attraction to a member of the same sex need not be a contradiction in terms.

The constituent audience for this Article is not only bisexuals but all

\(^{262}\) Id. at 1809-10.
people with a sexual orientation. Bisexuality represents what is uncomfortable about stagnant categories of sexual orientation, the kinds of categories that do not reflect the dynamic experience of sexual attraction. This Article has not argued that sexual attraction cannot ever be held constant, but has offered a vocabulary with which people can express a specific sexual orientation that differs from their general sexual orientation. Thus, the bisexual who partners with a member of the opposite sex need not identify as heterosexual, nor need the heterosexual who partners with a member of the same sex identify as homosexual. For many people the freedom to differentiate between two subcategories of sexual orientation is superfluous; their specific and general orientations are identical. But for individuals whose specific and general orientations differ—like the monogamous, partnered bisexual—this freedom can mean the ability to incorporate the range of their sexual experience into a single cohesive identity. And for the law, this distinction can help to ensure that protections against discrimination on the basis of sexual orientation define sexual orientation as it actually is as opposed to as it is easiest to characterize.

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